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45

A TREATISE ON INTERNATIONAL LAW

W. E. HALL

HENRY FROWDE, M.A.
PUBLISHER TO THE UNIVERSITY OF OXFORD
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A TREATISE

ON

INTERNATIONAL LAW

BY

WILLIAM EDWARD HALL, M.A.

FIFTH EDITION

EDITED BY J. B. ATLAY, M.A.
OF LINCOLN'S INN, BARRISTER-AT-LAW

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PREFACE TO THE FIFTH EDITION

THE late Mr. Hall at the time of his lamented death in November 1894 had completed for the press the fourth edition of this book, and the first nine sheets had received his final revision[1]. The task of correcting the remaining proofs and otherwise preparing the book for publication was entrusted to me by the Delegates of the Clarendon Press, at whose request also I have undertaken the present edition.

With regard to the introduction of new matter I have confined myself to what seemed absolutely necessary in order to bring the book up to date, and, in so doing, I have followed, as far as possible, the lines laid down by the author in previous editions. Wherever either in the text or notes I have gone beyond mere verbal alteration the additions are placed within square brackets [ ]. Events in Japan and China, the Venezuela boundary dispute, the Hague Conference with its various Conventions, together with incidents in the Spanish-American War and our own war in South Africa, are among the topics which have demanded notice. The controversy between Great Britain and Germany over the seizure of the *Bundesrath* having given a new prominence to the doctrine of 'continuous voyages' it seemed desirable that the paragraphs on that subject which Mr. Hall had consigned to a footnote should be brought up into the text, while I have taken upon myself to indicate in the note the position, opposed to the views of Mr. Hall, which was assumed by Lord Salisbury's Government.

[1] For a Memoir of Mr. Hall by Professor Holland, and some account of his writings, the reader is referred to the *Law Quarterly Review* for 1895, vol. xi, p. 113.

Several lists of treaties relating to consular jurisdiction, to the exemption of foreigners from military service, and to kindred subjects have been deleted. The rapidity with which such treaties have multiplied since the early editions of this book had swollen the notes containing them to dimensions which seemed out of all proportion to the value of the references themselves. For the convenience of those who make their first acquaintance with the elements of International Law through these pages, I have given, wherever the name of a jurist prior in date to the nineteenth century or of one of his works is first mentioned, the year of his birth and death, or of the work in question. Acting on the advice of Professor Holland, I have discarded the sectional numbering adopted in the previous editions. The fact that the bulk of the book has been reduced by some thirty pages is due solely to typographical changes. With the exception of the treaty lists above mentioned, and of a sentence here and there which has become inconsistent with the amended context, nothing has been omitted which appeared in the fourth edition. The preface to the third edition is retained as containing Mr. Hall's latest view of the future of International Law.

I have to record my gratitude to Professor Holland, K.C., for valuable suggestions, which I hope may have saved me from more than one pitfall, and to the Delegates of the Press for allowing me to associate my name, however humbly, with one whose friendship is among the most cherished memories of my life.

J. B. ATLAY.

LINCOLN'S INN,
February 1, 1904.

PREFACE TO THE THIRD EDITION

In issuing the third edition of the following work, it has been found necessary to add still further to its bulk. Several topics have assumed a greater importance than they before possessed; in others, recent occurrences have brought to light insufficiency of treatment; in others, new circumstances are tending to establish new rules. I have endeavoured to take notice of such of these topics as seem to me to be ripe for discussion. There are also a certain number of additions in matters of detail.

Perhaps it may not be inopportune to seize the present occasion to say a word or two as to the degree in which it is reasonable to expect that International Law shall be a restraining force on public conduct. Men who have the good fortune to deal actively with affairs are somewhat apt to think and speak lightly of its strength. It would be very unwise of an international lawyer to indulge in the delusion, with which he is often credited, that formulas are stronger than passions. I doubt much if he ever does so. But in order to get clean legal results, he must eliminate the varying elements of tendency to crime, or, to put it more mildly, of infringement of law. He only says what ought to be done, given the acquired moral habits of the past, and the rules of conduct which have been founded upon them. On the other hand, it would also be unwise, on the part of men whose minds are fixed wholly on the present, to underrate the abiding influence of international law. Since it has come into existence, it has often been quietly ignored or brutally disregarded. Nevertheless it so far has force that no state could venture to declare itself independent of it.

So things stand at present; but looking to the future it

must be granted that some doubt as to the strength of international law is not wholly unreasonable. Two different sets of indications point in opposite directions. In no previous period have endeavours been made, such as those which have been made during the present generation by the greater European States, to conclude agreements which should not merely express the momentary convenience, or the selfish aims, of the contracting powers, but should embody principles capable of wider and of impartial application, or to lay down rules of conduct which, it might fairly be hoped, would be adopted by the body of civilised nations. Great pacificatory settlements, such as those of the Congresses of Utrecht and Vienna, used occasionally to be made; but agreements suggesting rules of action, such as that with respect to occupation on the African coast, and agreements prescribing general rules of conduct, such as the Convention of Geneva, are almost wholly new. Again, within the last few years, professors of international law, and writers upon it, have used their best efforts to arrive, upon a vast range of disputed topics, at common conclusions, which might be offered for general acceptance with such authority as may be possessed by professors and writers as a body; and they have done a good deal towards rendering doctrine harmonious and consistent. If such indications as these stood alone, it might be taken not only that the definite rules of international law are extending in range, and gaining in precision, but that their hold is also becoming stronger day by day. On the other hand, it is not to be denied that there is a wide-spread distrust of the reality of this progress. Many soldiers and sailors, many men concerned with affairs, have little belief that much of what has been added of late years to international law will bear any serious strain. And, however convenient a standard of reference that law may be for the settlement of minor disputes; however willing statesmen may be to defer to it when they are anxious not to quarrel, grave doubt is felt

whether even old and established dictates will be obeyed when the highest interests of nations are in play. This feeling, for reasons which cannot be dismissed as unfounded, is probably stronger in England than elsewhere; but it is not confined to England.

Both sets of indications seem to me to point truly. Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of states. The area within which it reigns beyond dispute has in that time been infinitely enlarged, and it has been greatly enlarged within the memory of living men. But it would be idle to pretend that this progress has gone on without check. In times when wars have been both long and bitter, in moments of revolutionary passion, on occasions when temptation and opportunity of selfishness on the part of neutrals have been great, men have fallen back into disregard of law and even into true lawlessness. And it would be idle also to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half century and more, will all be given their answers at once. Some hates moreover will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous,

whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law. In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscience. On the whole the collective seems to exert itself in this way more surely than the individual conscience; and in things within the scope of international law, conscience, if it works less impulsively, can at least work more freely than in home affairs. Continuing temptation ceases with the war. At any rate it is a matter of experience that times, in which international law has been seriously disregarded, have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist.

I owe a debt of gratitude, which I must not leave unpaid, to the kindness of my friend Mr. Beresford Atlay, who has taken a very irksome labour off my hands by reading the proofs of this edition, inserting references to recent treaties, and revising and adding to the index.

Aug. 1, 1889.

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INTERNATIONAL LAW

INTRODUCTORY CHAPTER

In what international law consists.

INTERNATIONAL law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

Views held as to its nature and origin.

Two principal views may be held as to the nature and origin of these rules. They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them. According to the former view, a distinction is to be drawn between international right and international positive law; the one being the logical application of the principles of right to international relations, and furnishing the rule by which states ought to be guided; the other consisting in the concrete rules actually in use, and possessing authority so far only as they are not in disagreement with international right. According to the latter view, the existing rules are the sole standard of conduct or law of present authority; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of states. As between these two views in their crude form the majority of writers appear to hold to the former, but a considerable number, while thinking that positive international law derives its force from absolute

right, practically refer to positive law as the only evidence of what is right; so that international usage and the facts of modern state life return by a by-road to the position which they occupy in the second view, and from which they appear at first sight to have been expelled.

Reasons for adopting the second of these views.

In the following work the second view is assumed to be correct. The reasons for this assumption are as follows:—

Putting aside all question as to whether an absolute right, applicable to human relations, exists, or whether if its existence be granted its dictates can be sufficiently ascertained, two objections, both of which seem to be fatal, may be urged against taking it as the basis of international law.

The first of these is that it is not agreed in what the absolute standard consists. With some it is the law of God, with others it is a law of nature inductively reached, by others it is erected metaphysically. Standards so different in origin necessarily differ in themselves; and it is scarcely too much to say that if the fundamental ideas of the more prominent systematic writers on international law were worked out without reference to that body of international usage which always insensibly exerts its wholesome influence whenever particular rules are under consideration, there would be almost as many distinct codes as there are writers of authority[1]. The difference of opinion thus shown

[1] The fundamental ideas of the writers who have exercised most influence upon other writers or upon general opinion may be shortly stated as follows. Grotius (1583–1645) based international law in the main upon a natural law imposed upon man by the requirements of his own nature, of which the cardinal quality, so far as the relation of one man to another is concerned, he supposed to be the social instinct. This natural law he regarded as existing independently of divine command (De Jure Belli et Pacis, written in 1624, Prolegomena and lib. i. cap. i.). Pufendorf (1632–1694), by looking upon the natural law as being imposed by a divine injunction, analogous apparently to the injunctions of religion, and as not being binding apart from such injunction, loosened the intimacy of its connexion with human nature; and though he agreed with his predecessor in thinking that the social instinct at least is inherent in the human mind, he appears, in supposing it to have been given as a means of self-preservation, to elevate utility to the individual rather than right between man and man into its primary object (Law of Nature and Nations, written in 1672, bk. i. c. 2; bk. ii. cc. 2, 3).

is no doubt not greater than that which exists as to the principles by which the internal life of a state ought to be regulated, and as to the origin and sanction of those principles.

In one important respect Grotius and Pufendorf were at one. Both considered that natural law not only forbids acts detrimental to the social state, but enjoins acts tending to its conservation, so that neglect to contribute to the maintenance of that state amounts to an infraction of law. Thomasius (1655–1728), on the other hand, narrows the sphere of law by reducing its injunctions to the negative maxim, 'Do not do to others what you do not wish them to do to you,' and relegates everything beyond this to the domain of morals, with respect to which no external obligation exists. It is unnecessary to point out what different international laws would be obtained by the logical application of the former and the latter of these theories respectively. According to Wolff (1679–1764), man is bound by the law of his nature to attain the highest perfection of which he is capable, and the obligation to perform an act being regarded as giving rise to the rights necessary for its performance, he is endowed with innate rights of liberty, equality, and security, which are necessary to his development. These innate rights others are bound in their turn to respect; their acknowledgment may therefore be compelled, and their infringement punished. Subjectively also a man in the natural state is bound to assist his neighbour in arriving at the perfection which is the end of his being; but the obligation implies no correlative right to demand its fulfilment, and compliance with it cannot therefore be enforced (Jus naturae methodo scientifica pertractatum, written in 1741, esp. §§ 28, 78, 197, 208, 640, 645, 659, 669, 676). Thus the natural law of Wolff distinguishes, like that of Thomasius, between law and morals, but it again enlarges the compass of the former by expressly importing into it the principle of right to liberty of action. In their results, the one seems to lead to such laws as those which exist in actual human societies, and the other provides free scope for a vague ideal. The principle of liberty was converted by Kant (1724–1804) into the key of his system. Liberty is a conception of the pure reason, which presents itself to the will as the necessary condition of its action, and the practical principles founded upon it are the determining causes of particular actions, under a law of free obedience on the part of the will to the dictates of reason, and of corresponding external liberty, the presence of which is as necessary to the action of the will as is internal freedom. The dictates of reason indicate rights and obligations, and law consists in the conditions under which the choice of the individual with regard to their subject-matter can be reconciled with that of other men on the assumption of the independence of all upon any constraining will on the part of another; its object is to prevent such aberrant manifestations of will as are inconsistent with the rational liberty of all. Law, however, so defined, cannot exist between states, because they have no machinery for effecting this reconciliation by the use of a 'collective, constraining will' through the means of legislation, which can only be employed in an organised social community. They are therefore in a relation of non-law, in which force is the only arbiter of disputes; but this relation being in itself contrary to the dictates of reason, nations ought to issue

But the external conditions under which individuals and states live with reference to law, or with reference to law in the one case, and to rules equivalent to law in the other, are wholly dissimilar. Law in modern civilised states presents itself as being imposed and enforced by a superior, invested with authority for that purpose; to individuals, therefore, it is immaterial whether they agree with their neighbours as to the speculative basis of law; they have not to reason out for themselves the rules by which they intend to be governed; the law is declared to them by a competent authority, and conscientious persons are moved to obedience so soon as the order in which law is conveyed is communicated to them. States, on the other hand, are independent beings, subject to no control, and owning no superior; no person or body of persons exists to whom authority has been delegated to declare law for the common good; a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit; if therefore states are to be subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespectively of its origin, or else they must be agreed as to the general principles by which they are to be governed.

The second objection is, that even if a theory of absolute right were universally accepted, the measure of the obligations of a state would not be found in its dictates, but in the rules which are received as positive law by the body of states. Just as the legal obligations of an individual are defined, not by the moral ideal recognised in the society to which he belongs, but by the laws in force within it, so no state can have the right to demand that another state shall act in conformity with a rule in advance of the practical morality which nations in general have embodied

from it by agreeing with each other to live in a state of peace. Thus Kant's doctrine on its international side, while it offers an ideal standard of conduct, dispenses with the necessity of obeying it, except on the condition of express compact (Metaphysische Anfangsgründe der Rechtslehre, written in 1796).

in the law recognised by them; and a state cannot itself fall under a legal obligation to act in a different way from that in which it can demand that another state shall act in like circumstances. However useful therefore an absolute standard of right might be as presenting an ideal towards which law might be made to approach continuously nearer, either by the gradual modification of usage or by express agreement, it can only be a source of confusion and mischief when it is regarded as a test of the legal value of existing practices.

By what evidence the rules purporting to constitute international law are shown to be accepted as law.

If international law consists simply in those principles and definite rules which states agree to regard as obligatory, the question at once arises how such principles and rules as may purport to constitute international law can be shown to be sanctioned by the needful international agreement. No formal code has been adopted by the body of civilised states, and scarcely any principles have even separately been laid down by common consent. The rules by which nations are governed are unexpressed. The evidence of their existence and of their contents must therefore be sought in national acts—in other words, in such international usage as can be looked upon as authoritative. What then constitutes an authoritative international usage?

Usage, of which the authority is unquestionable.

Up to a certain point there is no difficulty in answering this question. A large part of international usage gives effect to principles which represent facts of state existence, essential under the conditions of modern civilised state life. Whether these are essential facts in the existence of all states is immaterial; several of them indeed are not so. The assumption that they are essential, so far as that group of states which is subject to international law is concerned, lies at the root of the whole of civilised international conduct; and that they have come to be regarded in this light, and unquestionably continue to be so regarded, is sufficient reason for taking as authoritative the principles and rules which result from them. Another portion of international usage gives effect to certain moral obligations, which are recognised as being the source of legal rules with

the same unanimity as marks opinion with respect to the facts of state existence.

No third basis of legislation can be found of such solid value as are the essential facts of existence of a society and the moral principles to which that society feels itself obliged to give legal effect. Of both the foregoing kinds of usage, therefore, it can be affirmed unhesitatingly that they possess a much higher authority than any other part of international law. It can also be affirmed as unhesitatingly that the principles which underlie them have been accepted not merely as forms of classification of usage, but as distinct sources of law. States are consequently bound, not only to respect those principles in the shape of existing usage, but in dealing with fresh circumstances to apply them whenever their application is possible. The international lawyer, in like manner, when testing the validity of practices claiming to be legal, or indicating appropriate modes of regulating new facts or relations, is justified, within the scope of the principles in question, in going beyond the rules which can be drawn from the bare facts of past practice. He is able, and ought, to hold that the principle governs until an exceptional usage is shown to have been established, or at least until it can be shown that the authority of the principle has been broken by practice at variance with it, but not treated as an infringement of the law. In other words, all practices or particular acts, claiming to be legal, which militate against the principles in question, must be looked upon with disfavour, and the onus of proving that they have a right to exist is thrown upon themselves.

It is to be observed that the accepted principles of international law sometimes lead logically to incompatible results. In such cases it is evident that as neither of two ultimate principles can control the other, and reconciling legislation at the hands of a superior is from the nature of the case impossible, there is nothing but bare practice which can fix at what point the inevitable compromise is to be made.

Usage, of which the value is open to question.

It is more difficult to determine the value of arbitrary usages unconnected with principle, or of usages professing either to be the groundwork of rules derogating from accepted principles, or to form exceptions from admitted rules. In some cases their universality may establish their authority; but in others there may be a question whether the practice which upholds them, though unanimous so far as it goes, is of value enough to be conclusive; and in others again it has to be decided which, or whether either, of two competing practices, or whether a practice claiming to support an exception, is strong enough to set up a new, or destroy an old, authority. To solve such questions it is necessary to settle the relative value of national acts. These split themselves into two great divisions, namely, unilateral acts and treaties and other compacts.

Treaties.

It appears to be usually thought that treaties are more important indications than unilateral acts of the opinion of the contracting parties as to what is, or ought to be, the law; and it is even frequently considered that they are in some sense a fountain of law to others than the signatory states. The reasoning upon which the latter notion rests is not very intelligible. It is conceded that 'in the full rigour of the law, treaties are only obligatory on the contracting parties;' but it is nevertheless held that 'when a certain number, freely entered into by divers nations, have embodied the same principles of natural law, imparting to it the same interpretation, and adopting the same methods for giving effect to it, although no one of them need be compulsorily applicable to states which have not been parties to it, a sort of jurisprudence—a species of law—is formed, which the majority of nations recognise as being obligatory, even upon those who have not signed any of its constituent parts[1].' The doctrine is seldom stated with

[1] Hautefeuille, Des Droits et des Devoirs des Nations Neutres: Discours Préliminaire. Calvo, Le Droit International, 3e ed. § 24, puts forward the same view more indefinitely, but with sufficient distinctness; and Bluntschli, Le Droit International Codifié, 2e ed. § 794, adopts it by implication in looking

this openness and breadth, but it is more or less consciously implied in the use which is generally made of what is called the conventional law of nations. In spite of the largeness of the support which it thus receives, there can be no hesitation in dismissing it at once as essentially unsound. As a pact between two parties is confessedly incapable of affecting a third who has in no way assented to its terms, the only ground on which it is possible that treaties can be invested with more authority than other national acts is that, when they enshrine a principle, they are supposed to express national opinion, in a peculiarly deliberate and solemn manner, and therefore to be of more value than other precedents. Even if this were the case, treaties would be a long way from establishing 'a sort of jurisprudence' separable from that produced by the aggregate of deliberate national acts; but it cannot be admitted that the greater number of treaties do in fact express in a peculiarly solemn manner, or indeed at all, the views of the contracting parties as to what is or ought to be international law.

Treaties included amongst those which have been supposed to express principles of law appear to be susceptible of division into three classes:

upon the declaration of the Treaty of Paris with respect to the effect of the flag on enemy's goods as universally binding, notwithstanding that the United States have not yet adhered to it.' Ortolan (Diplomatie de la Mer, Notice Additionnelle) states the reasons for the supposed authority of treaties as follows. The authors, he says, who have asserted it 'ont envisagé successivement et séparément les conventions conclues à diverses époques par chacune des puissances civilisées avec les autres; ils ont reconnu que, dans ces instruments publics ayant pour but non seulement de régler des intérêts de détail et particuliers, mais encore de fixer les grands principes d'intérêt général, quelques-uns de ces principes étaient toujours ou le plus souvent reconnus d'un commun accord; que si, dans des temps de guerre ou de mésintelligence, l'abandon de ces principes avait eu lieu quelquefois, les peuples, instruits par expérience des conséquences funestes de cet abandon, avaient proclamé de nouveau ces mêmes principes dans leurs traités de paix, et en avaient stipulé l'observation constante pour l'avenir. Dès lors on a été fondé à déduire de cette conformité presque générale de décisions une théorie de ce qui se pratique ou de ce qui doit se pratiquer entre les nations civilisées en vertu des stipulations écrites; et c'est là ce que l'on a nommé droit des gens conventionnel ou des traités.'

1. Those which are declaratory of law as understood by the contracting parties.

2. Those which stipulate for practices which the contracting parties wish to incorporate into the usages of the law, but which they know to be outside the actual law.

3. Those which are in fact mere bargains, in which, without any reference to legal considerations, something is bought by one party at the price of an equivalent given to the other.

The first of these kinds is for any purpose of international precedent extremely rare. A few instances there no doubt are of international instruments declaratory of true law; such, for example, as the Protocol signed at the Conference of London in 1871, by which the representatives of Russia, Austria, France, Germany, Great Britain, Italy, and Turkey, stated that they recognised it to be an essential principle of the law of nations that no power can be released from the engagements of treaties, or modify their stipulations, except with the consent of the contracting parties amicably obtained. But the greater number of the few treaties which profess to be declaratory are of the type of the Acts and Conventions of the two Armed Neutralities, and the Convention for the common defence of the liberty of trade between Denmark and Sweden in 1794, which may be taken by implication to assert the principles of the first Armed Neutrality, and to be declaratory of them as general law. In these cases it is certain that the weight of authority was not in accordance with the provisions of the treaties, and that their object was simply to enforce new rules upon a third state in the common interest of the contracting parties[1].

Certain introductory clauses are usually found in treaties of commerce, which do in fact involve principles of existing international usage, as in the case of stipulations that there shall be friendship between the contracting nations. This and like

[1] Treaties are often referred to as declaratory of a principle which are not so in fact. Thus the Treaty of Vienna is sometimes said to be declaratory of the principles of freedom of navigation. For its true effect see postea, p. 137.

covenants, however, are now mere words of surplusage; they add nothing to the authority of the principle which they embody. Once no doubt they were necessary; but long after they ceased to be so they remained as common forms of opening, and it can only be supposed that they owe to their use as such the position which they occupy as the sole exceptions to the general truth that express stipulations are not made to ensure obedience to a law by which both contracting parties would in any case feel themselves to be bound.

Of the second class of treaties there are not many which enunciate principles[1]; but there are a very large number which have for their aim to define the objects which an undisputed principle is to be permitted to affect, or the manner in which it is to be applied. Such are those which enumerate articles contraband of war, those which prescribe the formalities of maritime capture, those directed to the repression of the slave trade, and many of those regulating the functions and defining the privileges of Consuls. The value both of the more general and the more specific kinds is great to the international lawyer; not because the conventions which belong to them can be a source of law, but because they show the flow and ebb of opinion, and its strength at a given time with reference to particular doctrines or practices.

Treaties of the third class are not only useless but misleading.

[1] Treaties are sometimes referred to this class also which do not belong to it in fact. Thus the Treaty of Utrecht, which purported to have for one of its practical objects the establishment of a justum potentiae equilibrium, has been spoken of as being designed to affirm the doctrine of the balance of power. As examples of treaties which were really intended to enunciate principles may be instanced the Treaty of 1850 between Great Britain and the United States for the construction and regulation of a Ship Canal across Central America, and the Declaration of Paris in 1856. It was recited in the former that the contracting parties desired 'not only to accomplish a particular object, but also to establish a general principle,' in the latter that the signatory states proposed 'introduire dans les rapports internationaux des principes fixes' with reference to certain points of maritime international law. Apart from such express recitals, or from distinct external evidence, it would be rash to assume that a treaty is intended to enunciate a principle.

Unfortunately, they are also the most numerous. Sometimes they mingle with conventions intended to affirm or extend a principle in such manner as to blur their effect, or even to throw an air of uncertainty on the wishes of the contracting parties; sometimes they contradict in a long succession of separate agreements what from other evidence would appear to be the settled policy of a nation; sometimes they form a mere jumble in which no clue to intention can be traced. Thus in 1801, Great Britain and Russia and Great Britain and Sweden signed treaties by which enemy's goods in neutral vessels were rendered liable to confiscation, while in the same year Russia and Sweden reiterated as between themselves the principle of the armed neutrality under which hostile property was protected by a friendly ship. During the last century the United States concluded no less than ten treaties under which neutral goods were confiscated in enemy's vessels; but their courts regard such goods as free in all cases not specially provided for by international agreement. Again, in 1785 the United States agreed with Prussia that contraband of war should not be confiscable; by their treaty of 1794 with England not only were munitions of war subjected to confiscation, but the list was extended to include materials of naval construction; and in the only treaty since concluded by Prussia, in which the subject is referred to, except two in 1799 and 1828 reviving that of 1785 with the United States, articles contraband of war are dealt with in the usual manner. Instances of like kind might be endlessly multiplied, and it may be safely said that it is rarely that the treaty policy of any country is consistent with itself over a long period of time.

On thus exposing the nature of treaties to analysis, no ground appears for their claim to exceptional reverence. They differ only from other evidences of national opinion in that their true character can generally be better appreciated; they are strong, concrete facts, easily seized and easily understood. They are, therefore, of the greatest use as marking points in the movement of thought. If treaties modifying an existing

practice, or creating a new one, are found to grow in number, and to be made between states placed in circumstances of sufficient diversity; if they are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed, then it is known that a battle has taken place between new and old ideas, that the former called in the aid of special contracts till their victory was established, and that when they no longer needed external assistance, they no longer cared to express themselves in the form of so-called conventional law. While, therefore, treaties are usually allied with a change of law, they have no power to turn controverted into authoritative doctrines, and they have but little independent effect in hastening the moment at which the alteration is accomplished. Treaties are only permanently obeyed when they represent the continued wishes of the contracting parties.

Conclusions as to the legal value of different kinds of national acts.

If the legal value of national acts is not to be estimated with reference to a divine or natural law, and if treaties are mere evidences of national will, not necessarily more important, and occasionally, from being the result of a temporary exigency, less important than some unilateral acts, it remains to be asked whether all indications of national opinion with reference to international law are to be considered of an equal weight, except in so far as their significance is determined by attendant circumstances, and whether, therefore, authority will attach to them in proportion to their number and to the length of time during which they have been repeated. Subject to two important qualifications this may probably be said to be the case.

The first qualification is that unanimous opinion of recent growth is a better foundation of law than long practice on the part of some only of the body of civilised states. But it must be remembered that as no nation is bound by the acts of other countries in matters which have not become expressly or tacitly a part of received international usage, the refusal of a single state to accept a change in the law prevents a modification agreed upon by all other states from being immediately com-

pulsory, except as between themselves. The rule, as altered for their purpose, merely becomes an unusually solid foundation of usage, capable of upholding law in less time than if the number of dissentients had been greater. Thus the provisions of the Declaration of Paris cannot in strictness be said to be at present part of international law, because they have not received the adherence of the United States; but if the signatories to it continue to act upon those provisions, the United States will come under an obligation to conform its practice to them in a time which will depend on the number and importance of the opportunities which other states may possess of manifesting their persistent opinions.

The second qualification is that there are some states, the usages of which in certain matters must be taken to have preponderant weight. It is impossible to overlook the fact that the practice, first of Holland and England, and afterwards of England and France, exercised more influence on the development of maritime law than that of states weaker on the sea; and it would at the present day be absurd to declare a maritime usage to be legally fixed in a sense opposed to the continued assertion of both Great Britain and the United States. The acts of minor powers may often indicate the direction which it would be well that progress should take, but they can never declare actual law with so much authority as those done by the states to whom the moulding of law has been committed by the force of irresistible circumstance.

Whether international law constitutes a branch of true law.

In what has been said up to this point the rules governing the conduct of states have been spoken of as legal rules; it has therefore been implied either that they constitute a body of true law, identical in its essential characteristics with law regulating an organised political community, or at least that, if not identical with such law, they are so closely analogous to it as to be more properly described as law than by any other name. It is however not uncommonly thought—in England at any rate—that neither of these views is correct. The only fundamental

distinction, it is said, which separates legal from moral rules, is that the former are, and the latter are not, commands given and enforced by a determinate authority; both are general precepts relating to overt acts, but in the one case a machinery exists for securing obedience, in the other no more definite sanction can be appealed to than disapprobation on the part of the community or of a section of it. Judged by this test, it is urged, the rules of International Law are nothing more than counsels of morality, sanctioned by the public opinion of states.

That there is an element of truth in this criticism must be frankly admitted. International law does not conform to the most perfect type of law. It is not wholly identical in character with the greater part of the laws of fully developed societies, and it is even destitute of the marks which strike the eye most readily in them. But it is now fully recognised that the proper scope of the term law transcends the limits of the more perfect examples of law. To what extent it transcends them is not equally certain. The various ideas of law formed in different societies and times, and the various groups of customs which have been obeyed as law, have probably not yet been sufficiently compared and analysed, and until an adequate comparison and analysis have been made, no definition or description of law can be regarded as final. During the continuance of this state of uncertainty as to the proper limits of law, it is impossible, in dealing with international law, to ignore the two broad facts, that it is habitually treated as law, and that a certain part of what is at present acknowledged to be law is indistinguishable in character from it.

Even supposing the view to be erroneous that the body of international usages constituted a branch of law from the time at which it first acquired authority, the fact that states and writers have acted and argued as if it were law cannot but affect the nature of the rules which now exist. The doctrines of international law have been elaborated by a course of legal reasoning; in international controversies precedents are used in

a strictly legal manner; the opinions of writers are quoted and relied upon for the same purposes as those for which the opinions of writers are invoked under a system of municipal law; the conduct of states is attacked, defended, and judged within the range of international law by reference to legal considerations alone; and finally, it is recognised that there is an international morality distinct from law, violation of which gives no formal ground of complaint, however odious the action of the ill-doer may be[1]. It may fairly be doubted whether a description of law is adequate which fails to admit a body of rules as being substantially legal, when they have received legal shape, and are regarded as having the force of law by the persons whose conduct they are intended to guide.

It is moreover not true to say that municipal law is invariably enforced by a determinate authority. There are stages of social organisation in which public opinion, which is the ultimate sanction of all law, whether municipal or international, is often able only to say to the individual that, when the law is broken to his hurt, he may himself exact redress if he can. When the early Teutonic societies allowed a person, upon whom a certain kind of legal injury had been inflicted, to seize the cattle of the wrongdoer and keep them till he obtained satisfaction, or when they told him to refer a quarrel involving legal questions to the issue of trial by combat, they showed much the same powerlessness to enforce law directly that is usually shown by the community of states. Even at a far more advanced point of development there is probably always some law which can only be supposed by a violent fiction to be enforced by a determinate authority. A custom which, on being infringed, is brought before the courts for enforcement, and is enforced by them, must have been law for some indefinite time before judicial cognizance can be taken of it. If not, the courts have legislated, and the person against whom the custom has been enforced is subjected

[1] The above points are well put by Sir Frederick Pollock in a paper on the methods of Jurisprudence. Law Magazine, November 1882.

to an ex post facto law. The supposition of such legislation is inadmissible; and the fiction that the courts, without legislating, have by their decision transformed the custom retrospectively into law, is as unsatisfactory as fictions always must be. Evidently the courts give effect to a custom because it is already regarded in the community as having the force of law; and during the time that it has existed, before appeal has been made to the courts, it must have been imposed upon unwilling persons by the strength of public opinion alone.

To regard the foregoing facts as unessential is impossible. If the rules known under the name of international law are linked to the higher examples of typical positive law by specimens of the laws of organised communities, imperfectly developed as regards their sanction, the weakness and indeterminateness of the sanction of international law cannot be an absolute bar to its admission as law; and if there is no such bar, the facts that international rules are cast in a legal mould, and are invariably treated in practice as being legal in character, necessarily become the considerations of most importance in determining their true place. That they lie on the extreme frontier of law is not to be denied; but on the whole it would seem to be more correct, as it certainly is more convenient, to treat them as being a branch of law, than to include them within the sphere of morals.

PART I

CHAPTER I

PERSONS IN INTERNATIONAL LAW, AND COMMUNITIES POSSESSING AN ANALOGOUS CHARACTER

The communities governed by international law.

PRIMARILY international law governs the relations of such of the communities called independent states as voluntarily subject themselves to it. To a limited extent, as will be seen presently, it may also govern the relations of certain communities of analogous character. The marks of an independent state are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control. It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations.

These postulates assume the conformity of the nature of such states as are governed by law to the conditions necessarily precedent to the existence of law; because the capacity in a corporate person to be subject to law evidently depends upon the existence of a sense of right, and of a sense of obligation to act in obedience to it, either on the part of the community at large, or at least of the man or body of men in whom the will governing the acts of the community resides. In so far moreover as states are permanently established societies their marks represent a necessary condition of subjection to law. A society,

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for example, of which the duration is wholly uncertain cannot offer solid guarantees for the fulfilment of obligations, and cannot therefore acquire the rights which are correlative to them. It cannot ask other communities to enter into executory contracts with it, and at any moment it may cease to be a body capable of being held responsible for the effects of its present acts.

Their marks.

On the other hand, the marks constituted by independence and association with specific territory represent facts which, though they determine the form of the particular law, are not in themselves necessary to law.

The absolute independence of states, though inseparable from international law in the shape which it has received, is not only unnecessary to the conception of a legal relation between communities independent with respect to each other, but, at the very least, fits in less readily with that conception than does dependence on a common superior. If indeed a law had been formed upon the basis of the ideas prevalent during the Middle Ages, the notion of the absolute independence of states would have been excluded from it. The minds of men were at that time occupied with hierarchical ideas, and if a law had come into existence, it must have involved either a solidification of the superiority of the Empire, or legislation at the hands of the Pope. Law imposed by a superior was the natural ideal of a religious epoch; and in spite of the fierce personal independence of the men of the Middle Ages, the ideal might have been realized if it had not been for the mutual jealousy of the secular and religious powers. As it was, neither the Church nor the Empire became strong enough to impose law. With their definitive failure to establish a regulatory authority international relations tended to drift into chaos; and in the fifteenth century international life was fast resolving itself into a struggle for existence in its barest form. In such a condition of things no law could be established which was unable to recognise absolute independence as a fact prior to itself; and rules of conduct which should command obedience apart from an external sanc-

tion were the necessary alternative to a state of complete anarchy.

That the possession of a fixed territory is a distinct requirement must be looked upon as the result of more general, but not strictly necessary, circumstances. Abstractedly there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities, and though there might be difficulty in subjecting such societies to restraint, or in some cases in being sure of their identity, there would be nothing in such difficulties to exclude the possibility of regarding them as subjects of law, and there would be nothing therefore to render the possession of a fixed seat an absolute condition of admission to its benefits. The explanation of the requirement must be sought in the circumstances of the special civilisation which has given rise to international law. Partly, no doubt, it is to be found in the fact that all communities civilised enough to understand elaborated legal rules have, as a matter of experience, been settled, but the degree to which the doctrines of international law are based upon the possession of land must in the main be attributed to the association of the rights of sovereignty or supreme control over human beings with that of territorial property in the minds of jurists at the period when the foundations of international law were being laid. The notion of tribal or national sovereignty, universal after the fall of the Roman empire, disappeared during the Middle Ages before the feudal idea which united the right of control with the possession of determinate portions of land; and the substitution of the conceptions of Roman law for those of feudalism tended to strengthen the bond of connexion. As the result of this substitution, land actually under the administration of a particular person became freed from the paramount title or authority of others; the notion of 'dominium' was introduced; and by the sixteenth century the person or persons possessing sovereignty within a specific territory were deemed its absolute owners.

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From the invariable association of land with sovereignty, or in other words with exclusive control, over the members of a specific society, to the necessary association of such control with the possession of land, is a step which could readily be made, and which became inevitable when no instances were present of civilised communities without fixed seats.

When a community becomes a person in law.

States being the persons governed by international law, communities are subjected to law, with a certain exception which will be dealt with presently, from the moment, and from the moment only, at which they acquire the marks of a state. So soon, therefore, as a society can point to the necessary marks, and indicates its intention of conforming to law, it enters of right into the family of states, and must be treated in conformity with law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in conformity with the dictates of international law, and finally that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law. On the other hand, since, with the exception above mentioned, communities become subject to law from the moment only at which they acquire the marks of a state, international law takes no cognizance of matters anterior to the acquisition of those marks, and is, consequently, indifferent to the means which a community may use to form itself into a state. The legal status of a duly organised community is affected neither by moral faults of origin, nor by violations of right by which its establishment may have been accompanied, unless the violations have been such as to make it doubtful whether the community claiming to be a state will be able or willing to fulfil its legal obligations.

In what circumstances personal

The personal identity which is thus established exists in the eye of the law solely for international purposes. It is therefore retained so long as the corporate person undergoes no change

which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts. identity is retained.

It flows necessarily from this principle that internal changes have no influence upon the identity of a state. A community is able to assert its rights and to fulfil its duties equally well, whether it is presided over by one dynasty or another, and whether it is clothed with the form of a monarchy or a republic. It is unnecessary that governments, as such, shall have a place in international law, and they are consequently regarded merely as agents through whom the community expresses its will, and who, though duly authorised at a given moment, may be superseded at pleasure. This dissociation of the identity of a state from the continued existence of the particular kind of government which it may happen to possess is not only a necessary consequence of the nature of the state person; it is also essential both to its independence and to the stability of all international relations. If in altering its constitution a state were to abrogate its treaties with other countries, those countries in self-defence would place a veto upon change, and would meddle habitually in its internal politics. Conversely, a state would hesitate to bind itself by contracts intended to operate over periods of some length, which might at any moment be rescinded by the accidental results of an act done without reference to them. Even when internal change takes the form of temporary dissolution, so that the state, either from social anarchy or local disruption, is momentarily unable to fulfil its international duties, personal identity remains unaffected; it is only lost when the permanent dissolution of the state is proved by the erection of fresh states, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable.

The identity of a state is also unaffected by external modification through accession or through loss of part of its territory.

It is seldom, if ever, that enlargement so interferes with the continuity of its life as to make it difficult to carry out international obligations[1]. Annexation implies that the identity of the annexed territory is merged in that of the state to which it is added. The former, therefore, by becoming part of the latter, becomes subject to its obligations; while the annexing state, for the same reason, is not bound by personal contracts affecting its new acquisition, except when, having absorbed a state in its entirety, it becomes heir to the whole of the property of the latter, and consequently is morally obliged to accept responsibility for the debts with which it may have been burdened. The case of loss of territory is so far different that it may become impossible for a state to perform duties of guarantee or alliance under which it may lie by special agreement, but inability to perform contracts of this kind obviously leaves untouched both the capacity to give effect to general legal obligations, and to carry out special agreements based merely upon the possession of independence. The identity of a state therefore is considered to subsist so long as a part of the territory which can be recognised as the essential portion through the preservation of the capital or of the original territorial nucleus, or which represents the state by continuity of government, remains either as an independent residuum or as the core of an enlarged organisation.

When personal identity is lost.

States cease to exist by being absorbed into other states as the result of conquest or of peaceful agreement, by being split into two or more new states in such manner that no part can be

[1] Even Sardinia, while enlarging its area to nearly four times its original size by the absorption of the rest of the Italian States, and after changing its name to that of the kingdom of Italy, did not consider its identity to be destroyed, and held its existing treaties to be applicable as of course to the new provinces. This was no doubt an extreme case, and Holtzendorff (Handbuch des Völkerrechts, i. 37) seems justified in thinking that it would have been more reasonable to regard a new state as having been brought into existence by so great an expansion, coupled with a change of name and capital. Still, it must be admitted that the essential fact of ability to carry out international obligations affecting the old territory remained untouched, and that the government of the enlarged state was fully able to apply them to its fresh acquisitions.

looked upon as perpetuating the national being[1], and by being united upon equal terms with others into a new state.

Communities possessing the marks of a state imperfectly. Communities possessing the marks of a state imperfectly are in some cases admitted to the privilege of being subject to international law, in so far as they are capable of being brought within the scope of its operation.

States in possession of imperfect independence. A state in its perfect form has, in virtue of its independence, complete liberty of action, subject to law, in its relations with other states; and its liberty, for the purposes of international law, is not considered to be destroyed by the fact that it has concluded agreements fettering its action, provided that such agreements are terminable at any moment or upon stipulated notice, or provided that they are not of such nature in themselves as to necessarily subordinate the national will for an indefinite time to that of another power. But so soon as compacts are entered into, which are not intended to be revocable, or are not likely by the nature of their provisions to be susceptible of unilateral revocation, and which, at the same time, subject the external action of a state to direction by a will other than its own, it ceases within the sphere of these compacts to be independent, and consequently to be a person in international law. Its personality is not however wholly merged, and in matters not covered by the compacts it retains its normal legal position.

The usual classification of such states. States commonly understood to be subject to law in a partial manner are classed under the several heads of states joined to others by a personal, real, federal, or confederate union, and of states placed under the protection or suzerainty of others[2]. For

[1] This, for instance, would occur if Austria were to separate into German, Hungarian, Czech, Polish, and South Slavonic states.

[2] Some confusion is apt to creep into the arrangement of existing states under the proper heads, because of the inappropriate names by which some of them are designated,—as in the case of the new German Empire, which, to save the *amour propre* of the component parts, is called a confederated Empire,—and because, in some instances, of deficient attention on the part of writers to the essential facts. The characteristics properly distinguishing the different classes are, however, sufficiently well defined; see Ortolan, Dip. de la Mer (4^e^ ed.), liv. i. ch. 2; Heffter, Le Droit International de l'Europe (3^e^ ed.), §§ 20–1; Bluntschli, §§ 70, 75, 76, 78; Calvo, §§ 44–67.

international purposes, however, this classification is in great part immaterial. When it is proposed to place a community under the head of those which are capable of entering into some only of the relations with other states which are contemplated by international law, the only questions which require to be settled are whether its independence is in fact impaired, and if so, in what respects and to what degree. The nature of the bond derogating from independence which unites the community to another society is a matter, not of international, but of public law; because in so far as the former is identified with that society in its relations with other states, it is either a part of it, or in common with it is part of a composite state.

Whether states linked by a personal union, and members of federal states, are among states only partially subject to international law.

Looking at the subject from this point of view, states linked by a personal union may at once be excluded from consideration. A personal union exists, as in the instance of Great Britain and Hanover from 1714 to 1837, when two states, distinct in every respect, are ruled by the same prince; and they are properly regarded as wholly independent persons who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by or responsible for each other's acts[1]. For the opposite reason the members of a federal state are equally excluded from the category of states possessed of

[1] M. Heffter says (§ 20) that states joined by a personal union cannot make war upon one another. I fail to see what legal justification can be given for this assertion so long as the prince is looked upon as the organ or agent and not as the sovereign-owner of the state. Of course it is not as a matter of fact likely that war will be made without previous expulsion of the sovereign from one or the other, but this has obviously nothing to do with the matter in its legal aspect.

The term 'personal union' is sometimes applied when 'the individuality of the state is merged by such personal union, and with respect to its external relations, remains for the time in abeyance, but emerges again on the dissolution of the union, and resumes its rank and position as an independent sovereign state;' Halleck, International Law (ed. London 1878), i. 62; see also Phillimore, Commentaries upon International Law, § lxxvi. The relation thus described is wholly different from that of personal union in the ordinary sense; so long as it lasts, it is practically identical with that of real union. It only differs from the latter in that it purports to be terminable on the death of an individual or the cessation of a dynasty, while a real union, though not always in fact independent of a change in

imperfect independence. The distinguishing marks of a federal state upon its international side consist in the existence of a central government to which the conduct of all external relations is confided, and in the absence of any right on the part of the states forming the corporate whole to separate themselves from it. Under the Constitution of the United States, for example, the central authority regulates commerce, accredits diplomatic representatives, makes treaties, provides for the national defence, declares war and concludes peace; the individual states, on the other hand, are expressly forbidden to enter into any agreement with foreign powers without the assent of Congress, to maintain military or naval forces, or to engage in war. The citizens of the United States have a common nationality[1]. Again, in the two kingdoms of Sweden and Norway an hereditary king is invested with like power to that which belongs to the federal government of the United States, and provision is made, in case of extinction of the dynasty, for the election of a new common head, so that the permanence of the union is secured[2]. Under the Constitution of 1871, the German empire forms another state of the same character, notwithstanding that some of the component parts possess the complimentary privilege of receiving foreign ministers at their courts, and of accrediting ministers empowered to deal with matters not reserved to the Imperial Government. All Germans have a common nationality. The joint will of the several states regulates by means of the Imperial Government all matters connected with the diplomatic representation of the corporate state, and the latter has sole power of concluding treaties of peace and alliance, or treaties of any other kind for political objects, commercial treaties, conventions regulating questions of domicil and emigration, postal matters,

the personal sovereign, is contemplated as permanent. It is difficult to understand the advantage of classing together cases which are broadly distinct from each other, and of separating cases which for the purposes of international law are indistinguishable.

[1] Constitution of the United States, in Story, Commentaries on the Constitution of the United States, i. xvii.

[2] De Martens, Nouveau Recueil des Traités de Paix, ii. 608.

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protection of copyright and consular matters, extradition treaties and other conventions connected with the administration of civil or criminal law. Whenever members of the Confederation do not fulfil their constitutional duties, which include obedience to the central authority in the above matters, they may be constrained to do so by way of execution [1].

Real union.

A real union is indistinguishable for international purposes from a federal union. It occurs when states are indissolubly combined under the same monarch, their identity being merged in that of a common state for external purposes, though each may retain distinct internal laws and institutions. Such differences as exist between a state so composed and a federal state are merely matters of public law.

States in possession of imperfect independence. Confederated states.

Of states in possession of imperfect independence, confederated states are those which have the highest individuality. The union which is established between them is strictly one of independent states which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity. The best example of a union of this kind is supplied by the German confederation as it existed from 1820 to 1866 [2]. By the Act under which it was constituted, its objects were defined to be the maintenance of the external and internal security of Germany, and the independence and inviolability of the confederated states, who mutually guaranteed each other's possessions, and who could not make war on one another. A Diet was instituted, composed of plenipotentiaries of the states, which

[1] Hertslet, Map of Europe by Treaty, iii. 1931. The other instances of Federal union at present existing are Mexico, Colombia, Venezuela, the Swiss and Argentine Confederations. For the constitution of Switzerland, see De Martens, Nouv. Rec. Général, xi. 129. That of the Argentine confederation is nearly identical with that of the United States. Calvo, i. § 60; Twiss, The Law of Nations, i. § 48–9.

[2] The Confederation was formed in 1815, but it was not finally organized until the signature of the Schluss Act in 1820. See the Federal Act in De Martens, Nouv. Rec. ii. 353, and the Schluss Act, id. v. 466.

formed the organ of the Confederation for common external matters, and which, consequently, could receive and accredit envoys and conclude treaties on behalf of the Confederation, and could declare war against foreign states on the territory of the Confederation being threatened. These powers were not however exclusive. The individual states retained the right of receiving and accrediting ministers, of making treaties, and of forming any alliance of which the terms should not be prejudicial to the Confederation; and if the majority of the Diet decided in a case alleged to be one of common danger, that no such risk of hostile attack existed as would call the united forces of the Confederation into the field, the minority was authorised to concert measures of self-defence. The several states had no right of withdrawal from the Confederation, and when war had been declared by the Diet they could not make a separate peace; but the Diet had no means of constraining a recalcitrant state, except by using the military forces of other states, which could only be employed with their consent, and there was no trace of over-sovereignty affecting individual subjects of the respective states, who remained subjects of those states only, and had no common nationality. Thus the liberty of action of the various members of the Confederation was restrained so far only as was necessary for the common peace and the integrity of the different territories.

Protected states.

For the purposes of international law a protected state[1] is

[1] Protected states such as those included in the Indian Empire of Great Britain are not subjects of international law. Indian native states are theoretically in possession of internal sovereignty, and their relations to the British Empire are in all cases more or less defined by treaty; but in matters not provided for by treaty a 'residuary jurisdiction' on the part of the Imperial Government is considered to exist, and the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when the interests of the subjects of the native princes are gravely affected. The treaties really amount to little more than statements of limitations which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English sovereignty in India have greatly changed since these were concluded, and the modifications of their effect which the

one which, in consequence of its weakness, has placed itself under the protection of another power on defined conditions, or has been so placed under an arrangement between powers the interests of which are involved in the disposition of its territory. The incidents of a protectorate may vary greatly; but in order that a community may fall within the category of the protected states, which are persons in international law, it is necessary that its subjects shall retain a distinct nationality, and that its relations to the protecting state shall be consistent with its neutrality during a war undertaken by the latter; in other words, its members must owe no allegiance except to the community itself, and its international liberty must be restrained in those matters only in which the control of the protecting power tends to prevent hostile contact with other states, or to secure safety if hostilities arise. So long as these conditions are observed the external relations of the state may be entirely managed by the protecting power. The most important modern instance of a protected state is afforded by the United Republic of the Ionian Islands, established in 1815 under the protectorate of Great Britain. In this case the head of the government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the state was represented by it in its external relations. In making treaties, however, Great Britain did not affect the Ionian Islands unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the state received consuls, though it could not accredit them; and during the Crimean War it maintained a neutrality the validity of which was acknowledged in the English Courts [1]. The only pro-

changed conditions have rendered necessary are thoroughly well understood and acknowledged. [By notification in its official Gazette, August 21, 1891, the Indian Government declared that 'the principles of international law have no bearing upon the relations' between itself and the Native States under the Suzerainty of the Queen-Empress.] For the international aspects of protectorates over Eastern and African states and communities, not themselves subjects of international law, and not included in the Indian Empire, see postea p. 125.

[1] De Martens (Nouv. Rec. ii. 663) and Hertslet (338) give the Austro-

tected states now existing in Europe are the republics of Andorra and San Marino, and possibly the principality of Monaco [1].

States under the suzerainty of others.

States under the suzerainty of others are portions of the latter which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community such as that of making commercial conventions, or of conferring their exequatur upon foreign consuls. Their position differs from that of the foregoing varieties of states in that a presumption exists against the possession by them of any given international capacity. A member of a confederation or a protected state is *primâ facie* independent, and consequently possesses all rights which it has not expressly resigned; a state under the suzerainty of another, being confessedly part of another state, has those rights only which have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign.

Belligerent communities.

When a community in attempting to separate itself from the state to which it belongs, sets up a government and carries on

British Convention declaring the Ionian Islands to be an independent state under the protection of Great Britain; identical conventions were concluded with Russia and Prussia; and see the Leucade, Spinks, Adm. Prize Cases, 1854–6, 237. For the case of Cracow, see Twiss, i. § 27. The Danubian Principalities and Servia have also usually been mentioned among protected states. As, however, both Roumania and Servia, until their acquisition of independence by the Treaty of Berlin, legally formed part of the Turkish dominions, their case is the abnormal one of a protectorate exercised rather as against than in support of the sovereign of the country.

[1] The legal position of Monaco is far from clear. By the treaty of Peronne in 1641 the principality placed itself under the protection of France. In 1815 it was provided as part of the settlement of Europe that the protectorate should be transferred to Sardinia, and by the treaty of Turin in 1817 the necessary arrangements were made. Monaco unquestionably continued to be a protected state until after the cession of Nice to France by Italy; but in 1861 it took upon itself, without the concurrence of Italy, to cede a portion of its territory to France, which thus became interposed between it and the Italian frontier. In the particular circumstances of the case the act was tantamount to a repudiation of the Italian protectorate. Italy neither protested at the time nor has she subsequently asserted her rights, she therefore most likely has acquiesced. France has not assumed a protectorate. It consequently would seem most probable that Monaco is legally independent.

hostilities in a regular manner, it shows in the course of performing these acts a more complete momentary independence than those communities, just mentioned, of which the independence is qualified. But full independence at a given moment is consistent with entire uncertainty as to whether it can be permanently maintained, and without a high probability of permanence a community fails to satisfy one of the conditions involved in its conception as a legal person. Frequently however it is admitted, through what is called recognition as a belligerent, to the privileges of law for the purposes of the hostilities in which it has engaged in order to establish its legal independence. Such recognition may be accorded either by a foreign state, or by that from which the community has revolted. In the former case the effect is to give the belligerent community rights and duties, identical with those attaching to a state, for the purposes of its warlike operations, as between it and the country recognising its belligerent character, and also to compel the state at war with it to treat the recognising country as a neutral between two legitimate combatants, unless the good faith of the recognition can be impugned, when, as a wrong has been committed, the right accrues to obtain satisfaction by war. In the second case the state puts itself under an obligation to treat its revolted subjects as enemies and not rebels until hostilities are ended, and asserts its intention on the ground of the existence of war to throw upon other countries the duties, and to confer upon them the rights, of neutrality. So soon as recognition takes place, the parent state ceases to be responsible to such states as have accorded recognition, and when it has itself granted recognition to all states, for the acts of the insurgents, and for losses or inconveniences suffered by a foreign power or its subjects in consequence of the inability of the state to perform its international obligations in such parts of its dominions as are not under its actual control.

Their recognition as being possessed of belligerent rights.

The effect of recognition being so important, not merely to the society recognised, but to foreign countries and to the parent

state, it becomes necessary to fix as accurately as possible the conditions under which it may be granted. Putting aside the case of recognition by the parent state, which it may be assumed would not be given with undue haste, and by which therefore, if given before foreign recognition, it is not likely that the interests of foreign states would be prejudiced, the questions remain, whether a community claiming to be belligerent has a right in any circumstances to demand its recognition as such, and in what circumstances a foreign state may voluntarily accord recognition.

Whether they have a right to demand such recognition.

The first of these questions may be readily answered. It only requires to be put at all because of a certain confusion which is sometimes introduced into the subject of the recognition of belligerent character by mixing up its moral with its legal aspects. As soon, it is said, as a considerable population is arrayed in arms with the professed object of attaining political ends, it resembles a state too nearly for it to be possible to treat individuals belonging to such population as criminals [1]; it would

[1] It is implied by Vattel (Le Droit des Gens, written in 1758, liv. iii. ch. xviii. § 293-4), and stated by Bluntschli (§ 512), that insurgents possessing these characteristics have a legal right to recognition. See also President Monroe's Message on the recognition of the South American Republics in 1822; De Martens, Nouv. Rec. vi. i. 149. Somewhat loose language has also been used by English statesmen. In 1861 Lord John Russell, in answering a question in the House of Commons, said that 'with respect to belligerent rights in the case of certain portions of a state being in insurrection, there was a precedent which seems applicable to this purpose in the year 1825. The British government at that time allowed the belligerent rights of the provisional government of Greece, and in consequence of that allowance the Turkish government made a remonstrance. The Turkish government complained that the British government allowed to the Greeks a belligerent character, and observed that it appeared to forget that to subjects in rebellion no national character could properly belong. But the British government informed Mr. Stratford Canning that "the character of belligerency was not so much a principle as a fact, that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent, and even if this title were questionable, rendered it the interest well understood of all civilized nations so to treat them."' (Hansard, 3rd Series, clxii. 1566.) It is impossible to be certain on the terms of the despatch to Mr. Stratford Canning whether the British government intended to convey an impression that the Greek insurgents merely deserved, or that they had a legal right to, belligerent recognition. There is no room for a like doubt as to the effect

be inhuman for the enemy to execute his prisoners; it would be still more inhuman for foreign states to capture and hang the crews of war-ships as pirates; humanity requires that the members of such a community shall be treated as belligerents, and if so there must be a point at which they have a right to demand what confessedly must be granted. So far, the correctness of this view may at once be admitted. It is no doubt incumbent upon a state to treat subjects who may have succeeded in establishing a temporary independence as belligerents and not as criminals, and if it is incumbent upon the state itself, it is still more so upon foreign governments, who deal only with external facts, and who have no right to pass judgment upon the value, from a moral or municipally legal point of view, of political occurrences taking place within other countries. But the obligation to act in this manner flows directly from the moral duty of human conduct, and in the case of foreign states from that also of not inflicting a penalty where there is no right to judge; it has nothing to do with international law. As a belligerent community is not itself a legal person, a society claiming only to be belligerent, and not to have permanently established its independence, can have no rights under that law. It cannot therefore demand to be recognised upon legal grounds, and recognition, when it takes place, either on the part of a foreign government, or of that against which the revolt is

of a claim made by the United States on its own behalf against Denmark. In 1779 the latter power delivered up to England some merchant vessels of which Paul Jones had made prize, and which had been sent into Norwegian ports. Compensation was demanded, and in the course of the negotiation it was argued that 'in the case of a revolution in a sovereign empire, by a province or colony shaking off the dominion of the mother country, and whilst the civil war continues, if a foreign power does not acknowledge the independence of the new state, and form treaties of commerce and amity with it, though still remaining neutral, as it may do, or join in an alliance with one party against the other, thus rendering that other its enemy, it must, while continuing passive, allow to both the contending parties all the rights, which public war gives to independent sovereigns.' (Lawrence's Wheaton's Elem., Introd. cxxxiv.) The claim against Denmark was kept alive by intermittent action until 1844, and does not appear to have been ever formally dropped.

directed, is from the legal point of view a concession of pure grace.

True ground of recognition.

The right of a state to recognise the belligerent character of insurgent subjects of another state must then, for the purposes of international law, be based solely upon a possibility that its interests may be so affected by the existence of hostilities in which one party is not in the enjoyment of belligerent privileges as to make recognition a reasonable measure of self-protection. As a matter of fact this condition of things may arise so soon as hostilities approach the borders of the state which is their scene, and is inseparable from their extension to the ocean. In a time of maritime war between two states neutral powers concede to the belligerents certain rights which abridge the freedom of action of their subjects, and they allow the property of the latter to be seized and confiscated for acts which in time of peace would fall within the range of legitimate commerce. The possession of these belligerent privileges is necessary to the effective prosecution of hostilities; when therefore a government is engaged in a struggle with insurgents in command of a sea-coast, it invariably uses, and consequently all states at the outbreak of civil war may be expected to use, the same means of putting a stress upon an antagonist as would be employed against an enemy state. But these means, so far as they affect other powers, are only acquiesced in because of the existence of war, and under limitations and safeguards which, being prescribed by international law with reference only to war, could not be insisted upon during the continuance of nominal peace. The assailed community also cannot be expected to refrain from using like weapons to those with which it is attacked, and refusal on the part of foreign powers to acknowledge its right to act in the manner which is permitted to a state, would be met by force at the moment if it were strong enough, and would at any rate cause a resentment to which effect might be given at a future time if the insurgent community ultimately conquered independence.

Testing the right of a state to recognise insurgent com-

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Circumstances in which recognition is permissible.

munities as belligerent by the relation of the war to its own interest, three classes of cases may be distinguished with reference to which its conduct will naturally differ. So long as a government is struggling with insurgents isolated in the midst of loyal provinces, and consequently removed from contact with foreign states, the interests of the latter are rarely touched, and probably are never touched in such a way that they can be served by recognition. It is not therefore necessary, and it is not the practice, to recognise communities so placed, however considerable they may be, and however great may be the force at their disposal. When a state is contiguous with a revolted province it may be different. The incidents of continental war are such as to render the probability of embarrassment small, and it is therefore usual to leave cases involving questions of belligerent character to be dealt with as they arise, but it must be for the foreign state to decide whether its immediate or permanent interests will be better secured by conceding or withholding recognition; and though recognition, except in peculiar circumstances, may expose the conduct of a government to suspicion, the grant of recognition cannot be said to exceed the legal powers of the state. In the case of maritime war the presumption of propriety lies in the opposite direction. No circumstances can be assumed as probable under which the interests of a foreign state possessed of a mercantile marine will not be affected, and it may recognise the insurgent community, without giving just cause for a suspicion of bad faith, so soon as a reasonable expectation of maritime hostilities exists, or so soon as acts are done at sea by one party or the other which would be acts of war if done between states, unless it is evidently probable that the independent life of the insurgent government will be so short that the existence of war may be expected to interfere with the interests of the foreign state in a merely transient and unimportant manner[1].

[1] On the general question of recognition of belligerency, see Wheaton, Elements of International Law (ed. Lawrence, 1855), pt. i. ch. ii. § 7, and

Withdrawal of recognition.

Recognition of belligerency, when once it has been accorded, is irrevocable, except by agreement, so long as the circumstances exist under which it was granted; for although as between the grantor and the grantee it is a concession of pure grace, and therefore revocable, as between the grantor and third parties new legal relations have been set up by it, which being dependent on the existence of a state of war, cannot be determined at will so long as the state of war continues in fact. In other words, a state, whether it be belligerent or neutral, cannot play fast and loose with the consequences of a certain state of things;

Dana's note (No. 15) upon the passage; Bluntschli, § 512, and in the Revue de Droit International, ii. 452; Calvo, § 82–4; Bernard, Historical Account of the Neutrality of Great Britain during the American Civil War, ch. 5 and 7.

As the existence of belligerency imposes burdens and liabilities upon neutral subjects, a state engaged in civil war has not the right of endeavouring to effect its warlike objects by measures unfavourably affecting foreigners, which, though permissible in peace, are not allowed in time of war; it cannot enjoy at one and the same moment the special advantages afforded by opposite states of things. Thus in 1861, New Granada being in a state of civil war, its government announced that certain ports would be closed, not by blockade, but by order. The method was one which could not be adopted against a foreign enemy holding the ports in question; it could not consequently be adopted against a domestic enemy. Lord John Russell, speaking upon the subject, said, 'that it was perfectly competent to the government of a country in a state of tranquillity to say which ports should be open to trade, and which should be closed. But in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and that such a proceeding would be an invasion of the international law relating to blockade.' (Hansard, clxiii. 1646.) Subsequently, the government of the United States proposed to adopt the same measure against the ports of the Southern States, upon which Lord John Russell wrote to Lord Lyons that 'Her Majesty's government entirely concur with the French government in the opinion that a decree closing the southern ports would be entirely illegal, and would be an evasion of that recognised maxim of the law of nations that the ports of a belligerent can only be closed by an effective blockade.' (State Papers, North America, No. i. 1862.). In neither case was the order carried out. In 1885 the President of Colombia, during the existence of civil war, declared the ports of Sabanilla, Sta Marta, and Báranquilla, to be closed, without instituting a blockade. Mr. Bayard, Secretary of State of the United States, in a despatch of April 24th of that year, fully adopted the principle of the illegitimateness of such closure, and refused to acknowledge that which had been declared by Colombia.

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it cannot regulate its conduct simply by its own convenience. In refusing or granting recognition it casts special responsibilities upon other states; it is to be supposed that whatever course it adopts is for its advantage at the time of choice; it must therefore accept the responsibility which is correlative to the advantage, even though it should subsequently turn out that a disproportionate burden is imposed in the end.

Forms of recognition.

Since recognition of belligerency is not imposed upon a foreign state as a duty, but is caused by circumstances the force of which may not be fully present to the other parties interested, it is evidently necessary that a state recognising an insurgent community as belligerent shall render its intention perfectly clear, and shall indicate the date from which it will take up the attitude of neutral in a war. It must therefore issue a formal notification of some kind, the most appropriate probably being a declaration of neutrality. A parent state stands in a different position. It cannot be expected to volunteer direct recognition. The relation in which it conceives itself to stand to the insurgents must be inferred from its acts. Hence, the question arises, what acts are sufficient to constitute indirect recognition. There can be no doubt as to the effect of acts, such as capture of vessels for breach of blockade or carriage of articles contraband of war, which affect the neutral directly, and in a manner permissible only in time of war. But what is the effect of acts of the nature of *commercia belli*:—such, for example, as the conclusion of cartels for the exchange of prisoners? The pretension has been put forward by the United States that such acts, being acts consistent only with a state of war, constitute sufficient evidence of its existence to throw the duties of neutrality upon foreign states[1]. Evidence of the existence of hostilities conducted according to the analogy of war they

[1] The above view was urged by the United States during the controversy with Denmark mentioned in a previous note. It was claimed that the conclusion of cartels, &c., between England and the American insurgents constituted a recognition of the latter as belligerents, and consequently affected Denmark with the duties of neutrality.

certainly are; but it may be safely affirmed that states would not usually wish, in doing them, to be understood to recognise the belligerent character of insurgents, and as they in no way touch the interests of foreign powers, the latter would not themselves take them as a ground of recognition. It would seem to be better, from every point of view, that the performance of acts of such kind as those the expectation of which justifies recognition by a foreign state, should alone be held to imply recognition by the parent state.

Recognition by England of the Confederate States as belligerents.

The recognition by England of the Confederate States as belligerents in 1861 affords an example of the recognition of belligerent character, interesting both because the case presents a strongly marked instance of the circumstances which compel recognition on the part of a foreign power, and because of the controversy which arose between the governments of the United States and of Great Britain with reference to the propriety and opportuneness of recognition on the occasion in question. During the first three months of 1861 seven of the states composing the United States formed themselves into a separate Union, with a constitution intended to be permanent, under a fully constituted executive government, and with an elected legislative body. The insurgent community therefore possessed a government established as formally as is possible in a society the separate political existence of which is not acknowledged. Immediately on being constituted the executive took active measures to organise a military force; and hostilities broke out on the 11th of April with the bombardment of Fort Sumter by the Southern troops. Within a few days afterwards 75,000 men were called out in the Northern States, and before the end of the month 100,000 men were under arms in the revolted portion of the country. Actual war existed on a large scale, and there was every reason to believe that it would be conducted by the Confederate States in accordance with the rules of international law. Up to this point however, though the insurgent community satisfied the conditions necessarily precedent

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to recognition, there was no imperative reason for notice to be taken of it by foreign powers. The scene of war was remote, and the ocean as yet remained unaffected. But on the 17th April the President of the Southern States issued a Proclamation inviting applications for letters of marque and reprisal, and as at this period a large extent of coast was in the hands of the insurgents, such an expectation of maritime hostilities might have been reasonably entertained as to have justified immediate recognition. The likelihood of maritime war was converted into a certainty by a Proclamation issued by President Lincoln on the 19th April, which declared the coasts of the seceded states to be under blockade. Thus, when on the 14th May a Proclamation of neutrality was issued by the British Government, twelve days after it received intelligence that the two American Proclamations had been put forth, the condition of affairs was as follows:—the government of the United States had recognised the belligerent character of the Southern confederacy by proclaiming a blockade, that being a measure the adoption of which admitted the existence of war, in rendering foreign ships liable to penalties illegal except in time of war[1]; apart from the effect of the blockade as a recognition of belligerency, every element of a state of war between a legitimate government and a community in possession of *de facto* sovereignty was fully in existence, in circumstances making it probable that British interests would be gravely affected; finally, as the intercourse

[1] 'Now therefore, I, Abraham Lincoln, President of the United States . . . have deemed it advisable to set on foot a blockade of the ports within the states aforesaid in pursuance of the Laws of the United States and of the Law of Nations in such case provided. For this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and the date of such warning; and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as prize as may be deemed advisable.' Proclamation of the 19th April, 1861.

between England and North America was both large and incessant, and the cargoes belonging to English owners lying at the time in the Mississippi alone were worth a million sterling, it was obviously of immediate importance that the British Government should warn traders of the existence of a state of things which affected them with duties, and by which their freedom of commerce was restrained. The action of Great Britain was therefore not only justified but necessary. By the Government of the United States however it was made the subject of reiterated complaint. It was at first alleged that no war existed, that no war could exist so long as the United States retained the legal sovereignty of their dominions, and that therefore it was not in the power of a foreign state to recognise any society within their boundaries as having rights of war; it was necessary, in short, that recognition of independence should precede recognition of belligerency. This contention being not only untenable in itself, but being opposed to decisions given in the courts of the United States, it was succeeded by an assertion that although 'a nation is its own judge when to accord the rights of belligerency,' recognition which 'has not been justified on any ground of either necessity or moral rights[1]' is 'an act of wrongful intervention,' and it was urged that no necessity had arisen at the time of the issue of the Queen's Proclamation. No definition of necessary emergency was offered; but the refusal to admit an imminent certainty that the interests of a foreign state will be seriously touched by the operations of war as a due ground for recognition of belligerent character, implies that it is the duty of a state before according recognition to allow some illegal acts, at least, to be

[1] It is not altogether clear what is intended by the phrase 'moral rights.' Probably, however, it means moral right on the part of an oppressed community to be recognised. If so, it is an instance of an intrusion of sentimental, moral, or political, considerations into the sphere of pure law, which was frequent in American argument during the British-American controversies which took place from 1861 to 1872.

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done at the expense of its subjects. To state such a contention is to demonstrate its inadmissibility[1].

What states are subject to international law.

It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints. But states outside European civilisation must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction. It is not enough consequently that they shall enter into arrangements by treaty identical with arrangements made by law-governed powers, nor that they shall do acts, like sending and receiving permanent embassies, which are compatible with ignorance or rejection of law. On the other hand, an express act of accession can hardly be looked upon as requisite. By the Treaty of Paris in 1856 Turkey was declared to be admitted 'to a participation in the advantages of the public law of Europe and the system of concert attached to it'; but if she had been permitted, without such express admission,

[1] Bernard, British Neutrality, chaps. iv–vii; Mr. Seward to Mr. Adams, Jan. 19, 1861, State Papers, North America, No. ii. 1862; Mr. Seward to Mr. Adams, Jan. 12, 1867, State Papers, North America, No. i. 1867; Case of the United States laid before the Tribunal of Arbitration at Geneva, p. 17; The brig *Amy Warwick* and others, ii. Black, 635; Woolsey's International Law (5th ed.), § 180. M. Bluntschli sums up an examination of the controversy by saying, 'Tout le monde était d'accord qu'il y avait guerre, et que dans cette guerre il y avait deux parties belligérantes. Mais voilà, et voilà seulement ce que les Cabinets de France et de l'Angleterre ont présumé, en reconnaissant la Confédération comme étant de fait une puissance belligérante. Je ne puis donc en aucune façon y voir une injustice, une violation de droit pratiquée au détriment de l'Union. Que la déclaration ait été faite un peu plus tôt ou un peu plus tard, c'était là une question qui regardait la politique, non le droit.' (Rev. de Droit Int. ii. 462.)

to sign the Declaration accompanying the Treaty, which was in fact signed on her behalf, and of which the object was to lay down principles intended to be reformatory of law, it could scarcely have been contended that the legal responsibilities and privileges of Turkey were to be limited to matters covered by those principles.

When a new state comes into existence its position is regulated by like considerations. If by its origin it inherits European civilisation, the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If on the other hand it falls by its origin into the class of states outside European civilisation, it can of course only leave them by a formal act of the kind already mentioned.

A tendency has shown itself of late to conduct relations with states, which are outside the sphere of international law, to a certain extent in accordance with its rules; and a tendency has also shown itself on the part of such states to expect that European countries shall behave in conformity with the standard which they have themselves set up. Thus China, after France had blockaded Formosa in 1884, communicated her expectation that England would prevent French ships from coaling in British ports. Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind. European states will be obliged, partly by their sense of honour, partly by their interests, to be guided by their own artificial rules in dealing with semi-civilised states, when the latter have learned enough to make the demand, long before a reciprocal obedience to those rules can be reasonably expected. For example, it cannot be hoped that China, for a considerable

time to come, would be able, if she tried, to secure obedience by her officers and soldiers even to the elementary European rules of war; [and her representatives at the Hague Peace Conference of 1899 refrained from signing the Convention relative to the laws and customs of land warfare. On the other hand, the adhesion of China was given to the Convention for the pacific regulation of international disputes and to several other subsidiary instruments executed on the same occasion. The mere fact that the Chinese Government was invited to send representatives to such an assemblage may be taken as an acknowledgement of its international status, and the same argument applies to the Shah of Persia, on whose behalf all the Conventions of July 29, 1899 were signed and ratified. How far China has forfeited her position by the gross breach of comity involved in the assault on the Pekin Legations in the summer of 1900 remains to be seen.

The right of Japan to rank with the civilised communities for purposes of international law is now clearly established. Previously to the war of 1894 she had acceded (in 1886) to the Geneva Convention, and to various 'universal conventions' as to weights and measures, posts, telegraphs, and the like. During the course of hostilities against China, in that year and again in 1900, she adhered scrupulously, with one terrible exception, to the recognised laws of war, and attained a high standard in the care of her own troops, the treatment of the wounded enemies, and of the civil population generally[1]. The European nations have now abandoned their extra-territorial privileges in Japan, and the Anglo-Japanese Treaty of 1902 may be said to have set the final seal on the recognition of the latter Power.]

[1] [See an interesting article in the Law Quarterly Review for 1898, vol. xiv. p. 405, by Sakue Takahashi, Professor of Law in the Royal University in Tokio.]

CHAPTER II

GENERAL PRINCIPLES OF THE LAW GOVERNING STATES IN THEIR NORMAL RELATIONS

The fundamental rights and duties of states.

The ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption it is held that since states exist, and are independent beings, possessing property, they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others. It is also considered that their moral nature imposes upon them the duties of good faith, of concession of redress for wrongs, of regard for the personal dignity of their fellows, and to a certain extent of sociability.

Right of continuing and developing existence.

Under the conditions of state life, the right to continue and develop existence gives to a state the rights—

1. To organise itself in such manner as it may choose.

2. To do within its dominions whatever acts it may think calculated to render it prosperous and strong.

3. To occupy unappropriated territory, and to incorporate new provinces with the free consent of the inhabitants, provided that the rights of another state over any such province are not violated by its incorporation.

Thus a state may place itself under any form of government that it wishes, and may frame its social institutions upon any model. To foreign states the political or social doctrines which may be exemplified in it, or may spread from it, are legally immaterial. A state has a right to live its life in its own way,

so long as it keeps itself rigidly to itself, and refrains from interfering with the equal right of other states to live their life in the manner which commends itself to them, either by its own action, or by lending the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established.

Again, a state is free to adopt any commercial policy which it thinks most to its advantage; it may erect fortifications anywhere within its dominions; and it may maintain military or naval forces upon any scale, and organised in any way, that it likes. That the latter measures may invest it with a strategical position or a material strength which under certain contingencies may be a danger to other powers gives them in general no right to take umbrage or to endeavour to restrain its growth. In the absence of distinct menace the only precaution which can be taken is to arm with equal care. It is not an exception to this rule that it is legitimate to anticipate an attack which measures adopted by a state under colour, or in the exercise, of its right of self-development afford reasonable ground to expect. The same right to continued existence which confers the right of self-development confers also the right of self-preservation, and a point exists at which the latter of the two derivative rights takes precedence of the duty to respect the exercise of the former by another state. If a country offers an indirect menace through a threatening disposition of its military force, and still more through clear indications of dangerous ambition or of aggressive intentions, and if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defence, so that it would be in a position to give effect to its intentions, if it were allowed to choose its opportunity, the state or states which find themselves threatened may demand securities, or the abandonment of the measures which excite their fear, and if reasonable satisfaction be not given they may protect themselves by force of arms.

Rights of property.

The rights of a state with respect to property consist in

the power to acquire territory, and certain other kinds of property susceptible of being held by it, in absolute ownership by any means not inconsistent with the rights of other states, in being entitled to peaceable possession and enjoyment of that which it has duly obtained, and in the faculty of using its property as it chooses and alienating it at will.

Theory that the rights of a state over its territory, &c., are not strictly proprietary rights.

According to a theory which is commonly held, either the term 'property,' when employed to express the rights possessed by a state over the territory occupied by it, must be understood in a different sense from that which is attached to it in speaking of the property of individuals, or else its use is altogether improper. Property, it is said, belongs only to individuals; a state as such is incapable of owning it; and though by putting itself in the position of an individual it may hold property subject to the conditions of municipal law, it has merely in its proper state capacity either what is called an 'eminent domain' over the property of the members of the community forming it, in virtue of which it has the power of disposing of everything contained within its territory for the general good, or certain supreme rights, covering the same ground, but derived from sovereignty[1]. It cannot be denied that the immediate property which is possessed by individuals is to be distinguished for certain purposes from the ultimate property in the territory of the state, and the objects of property accessory to it, which is vested in the state itself. But these purposes are foreign to international relations. The distinction therefore, though it may be conveniently kept in mind for purposes of classification in dealing with the rules of war, has no further place in international law. Its proper field is public law. As between nations, the proprietary character of the pos-

[1] Vattel, liv. i. ch. xx. §§ 235, 244, but see also liv. ii. ch. vii. § 81; Heffter, § 64; Bluntschli, § 277. Calvo (§§ 208–9) distinguishes between the public and international aspects of the right of the state with reference to property, and recognises, as do also De Martens (Précis du Droit des Gens Moderne de l'Europe, § 72) and Riquelme (Elementos de Derecho Público Internacional, i. 23), the absolute character of the latter relatively to other states.

session enjoyed by a state is logically a necessary consequence of the undisputed facts that a state community has a right to the exclusive use and disposal of its territory as against other states, and that in international law the state is the only recognised legal person. When a person in law holds an object with an unlimited right of use and alienation as against all other persons, it is idle to say that he does not legally possess complete property in it. Internationally, moreover, a full proprietary right on the part of the state is not only a reasonable deduction of law, but a necessary protection for the proprietary rights of the members of a state society. The community and its members, except in their state form, being internationally unrecognised, any rights which belong to them must be clothed in the garb of state rights before they can be put forward internationally. A right of property consequently, in order to possess international value, must be asserted by the state as a right belonging to itself.

Alleged limitation upon the right to alienate.

A misapprehension of like kind is sometimes met with in regard to the right of alienation, the exercise of which is said to be subject to the tacit or express consent of the population inhabiting the territory intended to be alienated. The doctrine appears in two forms, a moderate and an extreme one. In its more moderate shape it appears to come to little more than a denial that title by cession is complete when the ceded territory has been handed over by the original owner to the new proprietor, peaceable submission by the inhabitants being necessary to perfect the right of the latter; but it is occasionally declared that the cession of land cannot be dissociated from that of the people who live and enjoy their political rights upon it, that 'a people is no longer a thing without rights and without will,' that its consent, if not otherwise proclaimed, must be testified by a vote of the population or its representatives, and that international law has adopted this principle by its practical recognition in the treaty of Turin, which regulated the cession of Savoy to France, in the treaty of London, by which the

Ionian Islands were ceded to Greece, in the treaty of Vienna, which stipulated for the eventual cession of Venetia to Italy, and in that portion of the treaty of Prague which referred to Northern Slesvig[1]. For an answer to this doctrine in its extreme form it is only necessary to traverse the allegation of fact. The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared. The pretension that it was sanctioned by the treaties cited has an air rather of mockery than of serious statement, when the circumstances accompanying the cession of Savoy and Nice are remembered, and when the only treaty of the number, the breach of which opportunity and desire combined to render possible, remained unobserved, and has finally been cancelled. As to the milder form of the doctrine, it is only to be said that states being the sole international units, the inhabitants of a ceded territory, whether acting as an organised body or as an unorganised mass of individuals, have no more power to confirm or reject the action of their state than is possessed by a single individual. An act, on the other hand, done by the state as a whole is, by the very conception of a state, binding upon all the members of it.

Rights of independence.

Independence is the power of giving effect to the decisions of a will which is free, in so far as absence of restraint by other persons is concerned. The right of independence therefore, in its largest extent, is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community[2], and so taken it would embrace the rights of preserving and developing existence which have been already spoken of. But it is more convenient to include

[1] Bluntschli, § 286; Calvo, § 220.

[2] A state is capable of occupying the position of a private individual within foreign jurisdiction, as, for example, in the case of England, which holds shares in the Suez Canal Company.

those rights only which a state possesses, not in respect of its existence as a living and growing being, but in a more limited aspect as a being exercising its will with direct reference either to other states or to persons and things within the sphere of its legitimate control.

Rights of independence directly affecting other states.

The former of these branches of the rights of independence gives rise to no special usages. It merely secures to a state with respect to other states a general liberty of action within the law as defined by the other rights and by the duties of a state. A state is enabled to determine what kind and amount of intercourse it will maintain with other countries, so long as it respects its social duties, and by what conditions such intercourse shall be governed; it is permitted to form relations of alliance or of special friendship; it may make contracts containing any provisions not repugnant to the law; and it may demand and exact reparation for acts done by other states which it may consider to be wrongs.

Rights of sovereignty.

The second branch comprehends a group of rights which go by the name of rights of sovereignty. The state community, in virtue of the supremacy of its common will over that of its individual members for the ends contemplated by it as a political society, puts them under obligations by its political, civil, and criminal legislation, which are not only exclusive of all other like obligations within the national territory, but are not necessarily extinguished as between them and their own state when they enter a foreign country or some place not under the jurisdiction of any power. And it being a necessary result of independence that the will of the state shall be exclusive over its territory, it also asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion. It consequently exercises jurisdiction there, not only with respect to the members of its own community and their property, but with respect to foreign persons and property. But as jurisdiction over the latter is set up as a consequence of their presence upon the

territory, it begins with their entrance and ceases with their exit, so that it cannot, except in a particular case to be mentioned later[1], be enforced when they have left the country; and with respect to acts done by foreign persons, it can only be exercised with reference to such as have been accomplished, or at least begun, during the presence within the territory of the persons doing them[2]. In principle, then, the rights of sovereignty give jurisdiction in respect of all acts done by subjects or foreigners within the limits of the state, of all property situated there, to whomsoever it may belong, and of those acts done by members of the community outside the state territory of which the state may choose to take cognizance.

In practice, however, jurisdiction is not exercised in all these directions to an equal extent.

Sovereignty in relation to the subjects of the state.

The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed, its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state, but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction. Thus the subjects of a state are not freed by absence from their allegiance; the fact of their legitimacy or illegitimacy if they are born abroad, the date at which they attain majority, the conditions of marriage and divorce, are determined by the state so far as their effects within its own dominions are concerned; if they commit crimes they can be arraigned before the tribunals of their country notwithstanding that they may have been already punished elsewhere.

Logically, the principle of the exclusive force of the corporate

[1] See postea, p. 256.

[2] For an exception made by the practice of some states, see postea, pp. 218 et seq.

Sovereignty in relation to subjects of foreign powers.

will within state territory would lead to the possession of an identical authority over foreigners and members of the state community during such time as the former remain in the country, in respect of all acts done by them there, of relations set up between them and other persons, and of duties owed to the state; while correlatively to such duties they would temporarily have the same rights as natural born subjects. But international usage does not allow the effects of the principle to be pushed so far. Its application receives limitations which are partly necessitated by that respect for the rights of other states over their members which is legally compulsory under the principle that a state must respect in others the rights with which it is itself invested, and which have partly grown out of unwillingness to extend to foreigners the full benefits enjoyed by subjects. Existing law stops short of the point of temporarily converting the subject of another state into a member of the community. Until a foreigner has made himself by his own act a subject of the state into which he has come, he has politically neither the privileges nor the responsibilities of a subject. His allegiance to his own state is recognised as being intact, and he cannot be obliged either to do anything inconsistent with it, or to render active service to the state under the control of which he momentarily is. On the other hand, he has no claim upon it for protection or good treatment except as a member of his own state, and to the extent that it has a right to demand. He is merely a person who is required to conform himself to the social order of the community in which he finds himself, but who is politically a stranger to it, obliged only to the negative duty of abstaining from acts injurious to its political interests or contrary to its laws. By accepted international law, therefore, a state has only the right of subjecting foreigners to such general or special political and police regulations as it may think fit to establish; of making them share in those public burdens which are not attached to the status of subject or citizen; of rendering them amenable to its ordinary criminal jurisdiction; of placing all

contentious matters in which they may be engaged under the cognizance of its own courts; and, subject to the qualification to be made immediately, of declaring that in contracts which are made, or to which it is asked that effect shall be given, within the state, and in matters connected with property existing within it, their competence, as well as the formalities requisite to give legal effect to their acts, shall be determined by the laws of the country [1].

Private international law.

The rights over foreigners and their property which are thus left to a state in strict law are further limited in practice by derogations which states are in the habit of voluntarily making from them. Modern legislation, in dealing with purely private relations between individuals, is more anxious to give effect to those relations as they really are, or as it is conceived that they ought to be, than to affirm the exclusiveness of the rights of sovereignty; and there are many cases in which this object is best attained by allowing the law of the country to which a foreigner belongs to operate in lieu of the territorial law, or by allowing a subject to be affected by a foreign instead of his national law, when the two are in conflict. The concessions or

[1] Grotius, de Jure Belli et Pacis, lib. ii. c. xi. § 5; Wolff, Jus Gentium, § 301; Vattel, liv. ii. ch. viii. §§ 101, 107–8; De Martens, Précis, § 83; Twiss, i. §§ 150–2; Bluntschli, §§ 388, 391; Calvo, § 1046. Portalis (1746–1807), quoted by Phillimore, puts the general principle of the submission of strangers to the authority of a foreign state as follows:—'Chaque état a le droit de veiller à sa conservation, et c'est dans ce droit que réside la souveraineté. Or comment un état pourrait-il se conserver et maintenir s'il existait dans son sein des hommes qui pussent impunément enfreindre sa police et troubler sa tranquillité? Le pouvoir souverain ne pourrait remplir la fin pour laquelle il est établi, si des hommes étrangers ou nationaux étaient indépendants de ce pouvoir. Il ne peut être limité, ni quant aux choses, ni quant aux personnes. Il n'est rien s'il n'est tout. La qualité d'étranger ne saurait être une exception légitime pour celui, qui s'en prévaut contre la puissance publique qui régit le pays dans lequel il réside. Habiter le territoire, c'est se soumettre à la souveraineté.' It is evident from what is said above that this language requires some qualification. Some writers make the unnecessary supposition that 'an individual in entering a foreign territory binds himself by a tacit contract to obey the laws enacted by it, for the maintenance of the good order and tranquillity of the realm.' Phillimore, i. § cccxxii.

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relaxations of sovereign rights which it has become customary for civilised nations to make for these reasons have given rise to a body of usage of considerable bulk, called private international law. Private international law is not however a part of international law proper. The latter, as has been seen, is concerned with the relations of states; in so far as individuals are affected, they are affected only as members of their state. Private international law, on the other hand, is merely a subdivision of national law. It derives its force from the sovereignty of the states administering it; it affects only the relations of individuals as such; and it consists in the rules by which courts determine within what national jurisdiction a case equitably falls, or by what national law it is just that it shall be decided. In the following work, therefore, private international law will not be touched upon.

Duty of administering reasonable civil and criminal justice to foreigners.

One further limitation of the rights of sovereignty there is, which, unlike the customary derogation last mentioned, is obligatory in strict law. As has been already mentioned, international law is a product of the special civilisation of modern Europe, and is intended to reflect the essential facts of that civilisation so far as they are fit subjects for international rules. Among these facts is the existence in almost all states of a municipal law, consonant with modern European ideas, and so administered that foreigners are able to obtain criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the state. International law therefore contemplates the existence of such law and such administration; and a state, professing to be subject to international law, is bound to furnish itself with them. If it fails to do so, either through the imperfection of its civilisation, or because the ideas, upon which its law is founded, are alien to those of the European peoples, other states are at liberty to render its admission to the benefits of international law dependent on special provision being made to safeguard the person and property of their subjects [1].

[1] Since the year 1856 Turkey has been in the position of a state, obliged to submit to derogations from her full rights of sovereignty, in consequence of

The exclusive force possessed by the will of an independent community within the territory occupied by it is necessarily attended with corresponding responsibility. A state must not only itself obey the law, but it must take reasonable care that illegal acts are not done within its dominions. Foreign nations have a right to take acts done upon the territory of a state as

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Responsibility of a state.

her institutions not being in reasonable harmony with those of European countries. At various times from 1535 to the present century, arrangements called Capitulations, and treaties confirmatory of them, were made between the Porte and European States, the effect of which was to withdraw foreigners from Turkish jurisdiction for most civil and criminal purposes. Turkey was then outside the pale of international law; but by the treaty of Paris she was brought within it. On general principles the Capitulations should have been abrogated; and in Protocol xiv, of March 25, 1856, it appears that 'M. le Baron de Bourqueney et les autres plénipotentiaires admettent que les capitulations répondent à une situation à laquelle le traité de paix tend nécessairement à mettre fin.' They have nevertheless been maintained. It is evident that a law inextricably mixed up with a religion which rejects equality between believers and unbelievers, and an administration so corrupt as is that of Turkey, offer no guarantee that foreigners will be treated with a sufficient modicum of justice.

Roumania and Servia are in a like legal situation. As provinces at first, and then as states dependent on Turkey, they were subject to the Capitulations; and when their independence was acknowledged by the treaty of Berlin it was provided that foreign immunities should be continued. Their case is a more remarkable one than that of Turkey. Their religion is no source of difficulty, and their laws are modelled upon the Code Napoléon. They are merely excluded from the full enjoyment of the rights of sovereignty because, through ignorance and evil traditions, the administrators of justice are not worthy of trust. Probably in these cases the limitations imposed by the capitulations will insensibly cease to exist. Already in Roumania foreigners frequently appeal to the local courts, and contracts are made (e. g. with importers of goods or contractors), subject to a condition that in case of dispute their rights under the capitulations shall be waived. As between Great Britain and Servia the immunities possessed under the Capitulations were abolished in 1880 by the treaty of Nisch (De Martens, Nouv. Rec. Gén. 2e série, vi. 459), except so far as they concern the mutual relations between British subjects and the subjects of other powers which shall not have surrendered them. [The extra-territorial privileges enjoyed by foreigners in Japan ever since that country was first thrown open to Europeans were abandoned by Great Britain in 1899 under the terms of a treaty concluded July 16, 1894. The example has been followed by the United States, Russia, Germany, Sweden, France, and Austria.]

It is obvious that there would be considerable difficulty in imposing limitations of the above kind on a state which had already been admitted to the full privileges of international law; but practical difficulties of application do not affect the question of principle.

being *primâ facie* in consonance with its will; since, where uncontrolled power of effective willing exists, it must be assumed in the absence of proof to the contrary that all acts accomplished within the range of the operation of the will are either done or permitted by it. Hence it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other states, and to use reasonable vigour in the administration of the law so provided.

Duty of respecting the independence of other states.

A second duty arising out of the right of independence is that of respecting the independence of others. As has already been said, a state has entire freedom of external and internal action within the law. To interfere with it therefore is a wrong, unless it can be shown that there are rights or duties which have priority, either invariably or in certain circumstances, over the duty of respecting independence.

Priority of the right of self-preservation over the foregoing duty.

That there is one such right is incontestable. Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *À fortiori* it is so with states, which have in all cases to protect themselves. If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable, to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties.

Whether any other right or duty has such priority.

Whether there is any other right or duty which has priority of the right of independence so long as a state endeavours, or professes that it endeavours, to carry out its strictly international duties is, to say the least of it, eminently doubtful, especially

considering that no guarantees exist tending to limit the occurrence of such interference to due occasions, or to secure that it shall be used only for its ostensible objects. The subject will be touched upon elsewhere.

Right of states to repress or punish violations of law.

When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrong-doer. Liberty of action exists only within the law. The right to it cannot protect states committing infractions of law, except to the extent of providing that they shall not be subjected to interference in excess of the measure of the offence; infractions may be such as to justify remonstrance only, and in such cases to do more than remonstrate is to violate the right of independence. Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organised authority, the work of police must be done by such members of the community of nations as are able to perform it. It is however for them to choose whether they will perform it or not. The risks and the sacrifices of war with an offending state, the chances of giving umbrage to other states in the course of doing what is necessary to vindicate the law, and the remoter dangers that may spring from the ill-will produced even by remonstrance, exonerate countries in all cases from the pressure of a duty.

Moral duties of states.

Duty of good faith.

Of the duties which flow directly from the possession by states of a moral nature, one only, viz. that of good faith, can probably be said to have acquired a legal value. In recognising the binding force of contracts, law takes it up and includes it in itself. But there can be little question that all other duties, which are independent of the legal principles already stated, remain in the stage of purely moral obligations. There are but two, both arising out of the duty of sociability, which can at all be said to put in a serious claim to fall within the boundaries of law.

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Alleged legal duty of a state to permit commercial and other intercourse to be maintained with it by foreign countries.

It is not uncommonly said that nations have a right to maintain intercourse, if it so pleases them, with other nations; that an entire refusal on the part of a state to allow of intercourse, by being a denial of a fundamental legal obligation, is a renunciation of the advantages of international law, so that a nation becomes an outlaw by isolating itself; and that in particular the innocent use of the land and water communications within the territory of a state cannot be withheld from other states, and the privilege of trade in articles of necessity cannot be refused[1]. The doctrine is no doubt limited by the qualification that a state may take what measures of precaution it considers needful to prevent the right of access and intercourse from being used to its injury[2], and may subject foreigners and foreign trade to regulation in the interest either of its own members or of states which it wishes to favour. In the last resort however there would still remain a right taking priority of the rights of independence and property, and capable of being enforced, if broken, by war. Of the working of such a right, if it existed, there would be deep traces in both law and history. In law however it cannot be pretended that any definite usages are to be referred to it, except those of the freedom of territorial seas to navigation and of the opening of rivers to co-riparian

[1] Heffter, §§ 26 and 33; Grotius, De Jure Belli et Pacis, lib. ii. c. ii. § 13; Bluntschli, p. 26.

The doctrine is at least an old one. Franciscus à Victoria (1480-1546) argued (Relectiones Theologicæ, Relect. v. sect. iii. 2) that the Spaniards had a right to go to the Indies and live there because it has been the custom from the beginning of the world for any one to go into whatever country he chooses, and prohibition of entrance is a violent measure not far removed from war.

[2] In many states laws of more or less stringency are in force, preventing the access, or providing for the expulsion, of alien vagabonds, destitute persons, criminals, and others whose presence in the country would be undesirable. For an abstract of the laws of different states on the subject, see Parl. Papers, Miscell. No. 1, 1887. [And see Musgrove v. Chun Teeong Toy, L. R., App. Ca. 1891, p. 272, where the Judicial Committee of the Privy Council decided that an alien has no legal right enforceable by action to enter British territory.] The recent legislation of the United States is a somewhat excessive instance of the use of a right, which in the most limited view of the scope of sovereignty must be admitted to exist. Comp. postea, pp. 213 et seq.

states. The former can be accounted for as readily by the absence of any wish to interfere with harmless navigation as by the recognition of a right; and the latter will be seen later to be destitute of an authoritative character. The evidence of history is still less favourable. States formerly claimed a right of innocent passage for military purposes. But this, so far from governing the rights of independence, has long been recognised to be subordinate both to them and to the duties of neutrality which are founded on them. In other directions there is no trace of the operation of the supposed right. It is true that the interest which every country has in trade prevents the questions from arising which might be produced by total or by almost complete seclusion; but if so wide-reaching a right had been admitted at all as an operative rule of law, the occasions for its employment adversely to foreign states would neither have been few nor insignificant.

Alleged legal duty of extraditing criminals.

It is also alleged that states have a right to require that persons accused of crime, who have escaped into a foreign country, shall be delivered up for trial and punishment on conviction. Authority is much divided on the matter; but there appears on the whole to be a distinct preponderance of opinion against the existence of the right, and the weight of argument unquestionably leans in the same direction. Sometimes it is said that crimes, or at least the more serious crimes, are not merely an infraction of a command which a particular society chooses to give; they sap the foundations of social life, they are an outrage upon humanity at large, and all human beings therefore ought to contribute to repress them. More often it is said that all nations have a common interest in the repression of crime, that its commission is encouraged when a criminal enjoys immunity so soon as he leaves the territory of his country, and that in order to secure reciprocity states must give up criminals at the demand of their neighbours. The latter views are just, but it is difficult to connect them with a duty of extradition. An obligation to do an act for the benefit

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of another person cannot be founded on a demonstration that to perform it will be advantageous to the doer. The former argument, on the other hand, goes too far. It implies that international law commands human beings to combine for the repression of everything which is gravely injurious to the bases of social life. This evidently it does not do; and as a matter of fact, even in the particular question of extradition, states have been far from acknowledging a duty of giving up criminals. Surrender, apart from convention, has been unusual, and when effected, it has been treated as an act of comity. In recent times, since facility of travel has given criminals more opportunities of escaping from the scene of their crime, and it has consequently become important to be able to obtain their extradition, delivery for specified crimes, and under specified conditions, has been provided for internationally by express agreements. Positive international law therefore does not recognise the duty of extradition; in other words, assuming international law to be what it was stated to be in the Introduction, the duty of extradition cannot at present exist[1]. That it is not only wise to give up fugitive criminals, but that they ought to be surrendered, may readily be granted. But the obligation is that only which is stated by M. Bluntschli[2]; the individual, he says, does not completely satisfy the call of moral duty if he merely does what is right within his own sphere of activity, without offering a hand to others who need it to do right in their sphere: and just as little does a state entirely fulfil its task if it acts justly in its own dominions, but declines to give to other states the help of which they are in want.

Duties of courtesy.

By many writers the ceremonial rules which regulate the

[1] The chief authorities on either side are enumerated by Fœlix, Droit International Privé, liv. ii. tit. ix. ch. vii, and Von Bar, Das Internationale Privat- und Strafrecht, § 148. Among recent authors, Sir R. Phillimore (i. § ccclxiv), Woolsey (§ 77), Bluntschli (§ 395), and Fiore (Trattato di Diritto Internazionale Pubblico, § 611), deny that extradition is legally obligatory. Calvo (Liv. xv. Sect. ii) gives a very full account of the treaties on the subject, and of practice independently of treaties.

[2] Staatswörterbuch, i. 501.

forms of state relations are included in international law. They conceive that the feelings of honour and personal dignity possessed by states not only prompt a wish that the existence of those feelings shall be recognised by other states, but confer a legal right to demand external manifestations of recognition. To the English mind the elevation of courtesy, and of observance of the etiquette which is its formal expression, into a legal duty is not easily comprehensible. The most that can be said of them is that an intentional breach of ceremonial rules is an offensive act, and that an offensive act is inconsistent with the comity which exists between friendly nations; but their disregard gives no right to exact reparation by force, or to take any further measures, if reparation be denied, than to return discourtesy with discourtesy, or to withdraw from actively friendly intercourse[1].

Insusceptibility of the open sea to be appropriated as property.

It being recognised that states are unable to maintain effective control over large spaces of sea, so as to be able to reserve their use to themselves, it is a principle of international law that the sea is in general insusceptible of appropriation as property. The qualifications by which the application of this principle is limited will be examined later.

[1] International ceremonial rules have reference to—

1. The direct relations of sovereigns with each other.
2. Diplomatic correspondence.
3. The intercourse of official persons with each other.
4. Maritime ceremonial.

Ample information with respect to them will be found in Heffter (§§ 194–7), Calvo (§§ 296–345), or Klüber (Droit des Gens Moderne de l'Europe, §§ 89–122).

CHAPTER III

GENERAL PRINCIPLES OF THE LAW GOVERNING STATES IN THE RELATION OF WAR

In what the relation of war consists.

When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant.

The place of war in international law.

As international law is destitute of any judicial or administrative machinery, it leaves states, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognises war as a permitted mode of giving effect to its decisions. Theoretically therefore, as it professes to cover the whole field of the relations of states which can be brought within the scope of law, it ought to determine the causes for which war can be justly undertaken; in other words, it ought to mark out as plainly as municipal law what constitutes a wrong for which a remedy may be sought at law. It might also not unreasonably go on to discourage the commission of wrongs by investing a state seeking redress with special rights and by subjecting a wrong-doer to special disabilities.

How far international law defines just causes of war.

The first of these ends it attains to a certain degree, though very imperfectly. It is able to declare that under certain circumstances a clear and sufficiently serious breach of the law, or of obligations contracted under it, takes place. But in most of the disputes which arise between states the grounds of quarrel, though they might probably be always brought into connexion with the wide fundamental principles of law, are

too complex to be judged with any certainty by reference to them; sometimes again they have their origin in divergent notions, honestly entertained, as to what those principles consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed; and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not therefore possible to frame general rules which shall be of any practical value, and the attempts in this direction, which jurists are in the habit of making, result in mere abstract statements of principles, or perhaps of truisms, which it is unnecessary to reproduce[1].

The legal position of parties to a war relatively to each other.

The second end international law does not even endeavour to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions. The obedience which is paid to law must be a willing obedience, and when a state has taken up arms unjustly it is useless to expect it to acquiesce in the imposition of penalties for its act. International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights[2].

[1] Ayala, De Jure et Officiis Bellicis (published in 1582), lib. i. c. ii. § 34; Grotius, De Jure Belli et Pacis, lib. i. c. iii. § 4, and lib. iii. c. iii. § 1, and c. iv; Vattel, liv. iii. ch. xii. §§ 190–2; De Martens, Précis, § 265; Halleck, i. 472.

[2] The conditions under which war is just are largely explained by Grotius (lib. ii. c. i. and xxii–vi), Pufendorf (bk. viii. c. vi. § 3), Wolff (Jus Gent. §§ 617–46), Vattel (liv. iii. ch. iii), Halleck (ch. xv), and Fiore (ii. 238, ed. 1869); and are more shortly noticed by Franciscus à Victoria (Relect. Theol. vi), Ayala (lib. i. c. ii. § 12), Albericus Gentilis (De Jure Belli, written in 1588, lib. i. c. iii), De Martens (Précis, § 265), and Klüber (§ 237). Heffter (§ 113) properly characterises discussions upon the subject as 'oiseuses.'

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Limits of the right to use violence in war.

The use of violence by a country towards its enemy necessarily suspends the full observance of the right to the enjoyment of independence and of the continuance and development of existence, which a state possesses when in its normal relation to others. Except in so far also as the right to use violence may be limited by something external both to itself and to any of the rights over which it thus has a necessary precedence, it is incompatible with a secure enjoyment of the rights of property. The more important therefore of the definite rights belonging to states in their normal relation to each other are governed by the right to use violence for a specific end. The temporary and exceptional right supplants for the moment the permanent rights. But just as violence in war has at no time of modern European history been in fact exercised without the encumbrance of moral restraint, so theoretically it must always be exercised with due regard to the character of the state as an aggregate composed of moral beings. It is agreed that the use of wanton and gratuitous violence is not consistent with the character of a moral being. When violence is permitted at all, the amount which is permissible is that which is necessary to attain the object proposed. The measure of the violence which is permitted in war is therefore that which is required to reduce the enemy to terms[1]. It is of course evident that this amount is conceivably variable, that greater or less violence might be regarded as necessary according to the degree of obstinacy shown by the enemy, and that in the absence of specific rules, applying the general principle, a latitude might be given to belligerent action which would reduce the principle to impotence. At this point usage steps in, and provides from time to time standards of permissible violence for universal

The doctrine of M. Bluntschli (§§ 515–8) must be exempted from the charge of being truistic, whatever may be the criticism to which it is exposed on other grounds.

[1] Grotius, lib. iii. c. i. § 2; Vattel, liv. iii. c. viii. §§ 136–8; Lampredi, Juris Publici Universalis Theoremata (written in 1776), pars iii. c. xiii. §§ 1–5; Heffter, § 119.

application. The differences in the kind and degree of resistance which can be offered by civilised nations to an enemy are not considered to be such as to justify differences in the kind of violence employed to subdue it. In all wars consequently the same means of putting stress upon an adversary must be employed, save in rare cases when, by himself overstepping the prescribed bounds, the latter makes it necessary or allowable to adopt exceptional measures with respect to him.

In what international law as applied to war consists.

International law as applied to war thus consists in customary rules by which the maximum of violence which can be regarded as necessary at a given time is determined. These rules, though sufficiently ascertained at any particular moment to afford a test of the conduct of a state, have been, and still are, changing gradually under the double influence of the growth of humane feeling and of the self-interest of belligerents. Springing originally from limitations upon a right, which in its extreme form constitutes a denial of all other rights, and developed through the action of practical and sentimental considerations, the law of war cannot be expected to show a substructure of large principles, like those which underlie the law governing the relation of peace, upon which special rules can be built with fair consistency. It is, as a matter of fact, made up of a number of usages which in the main are somewhat arbitrary, which are not always very consistent with one another, and which do not therefore very readily lend themselves to general statements. So far as any connexion between them exists, it can be indicated sufficiently, and more conveniently than here, when the various usages are separately discussed.

The doctrine that the relation of war does not affect individuals except in so far as they con-

In what has just been said it has been taken for granted that a certain doctrine is not part of international law, which is declared by many writers to be of incontestable authority, which, if it is really accepted, constitutes a fundamental principle of the laws of war, and which, if carried out to its natural results, would deeply modify the rules by which belligerents are actually guided. A doctrine of such pretension must be examined, and if it is

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tribute to the prosecution of hostilities.

groundless, must be shown to be so, before the special rules affecting war can be satisfactorily treated.

The doctrine in question starts with the admitted fact that international law is concerned only with the relations of states, and that war is consequently 'a relation of a state to a state, and not of an individual to an individual.' The individual, so far as he is affected at all, is affected only through his state. But individuals, it is said, occupy a double position. In one respect they are private persons, with rights of property and person which have no relation to state life; and in another they are members of the state, from whom it derives its means of carrying on war, and whom it employs as its agents. These two aspects correspond, according to the theory, to a substantial distinction; to which some writers give effect by supposing an individual to be an enemy only while actually fighting for his country, and others by regarding him as such to the extent only that he is in the service of his state, or that he contributes to enable it to sustain hostilities. Both consider that in all matters outside one or other of these lines he is a stranger to the war in person and property.

In opposition to this doctrine is another, which also takes as its basis that international law is concerned only with the relations of states. War is a relation between states alone. But states being the only subjects of international law, that law takes cognizance of the individual solely through his state, and as belonging to it, so that except as a member of it he has neither personal nor proprietary rights. Thus for good and for evil he is wholly identified with it, and when war is declared he becomes the enemy of the enemy state and of every person belonging to it.

It is claimed on behalf of the former theory, not only that it furnishes an admitted principle to modern international law, but that it is in fact applied in many of the actual rules of war, and that many of the improvements by which modern law is distinguished from the older customs are due to it.

In the first hundred and seventy years of the existence of international law as a system, the notion of the separability of the individual from his state for the purposes of war was unknown to international jurists. To all it was a matter of course that the subjects of an enemy state were themselves individually enemies [1]. It was not till 1801 that the theory of the exclusion of private persons as such from the hostile relations of the states to which they belong began to find its way into international law. In that year Portalis, in a speech delivered on opening the French Prize Court, said that 'war is a relation of state to state, and not of individual to individual. Between two or more belligerent nations the private persons of whom those nations are composed are only enemies by accident; they are not so as men, they are not even so as citizens, they are so only as soldiers [2].'

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[1] Grotius, lib. iii. c. iii. § 9, and c. iv. § 8; Pufendorf, bk. viii. ch. vi; Molloy, De Jure Maritimo (written in 1676), bk. i. ch. i. § 22; Bynkershoek, Quæst. Jur. Pub. (written in 1737), lib. i. c. i; Burlamaqui, The Principles of Natural and Politic Law, trans. by Nugent (written in 1763), vol. ii. pt. iv. ch. iv. § 20; Wolff, Jus Gent. §§ 721 and 723; Vattel, liv. iii. ch. v. §§ 70–2; Lampredi, Jur. Pub. Theorem. pars iii. c. xii. § 10. See also the judgment of Mr. Justice Johnson in the case of the Rapid, viii Cranch, 160–2.

[2] Portalis borrowed his doctrine almost textually from Rousseau. 'La guerre,' says the latter, 'n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs. Enfin chaque état ne peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport.' He goes on to make the startling assertion that 'ce principe est même conforme aux maximes établies de tous les temps et à la pratique constante de tous les peuples policés.' Contrat Social, liv. i. ch. iv.

With an admirable irony, of which it is hard to suppose him unconscious, Talleyrand wrote to Napoleon in 1806:—'Trois siècles de civilisation ont donné à l'Europe un droit des gens que, selon l'expression d'un écrivain illustre, la nature humaine ne saurait assez reconnaître. Ce droit est fondé sur le principe que les nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible.

'D'après la maxime que la guerre n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, non pas même comme membres ou sujets de l'état, mais uniquement comme ses défenseurs, le droit des gens ne permet pas que le droit de guerre, et le droit de conquête

The doctrine did not immediately spread. De Martens, Klüber, Kent, Wheaton, and Manning expressly or implicitly manifested their adherence to the traditional view; and an opinion which is supported by their authority may be regarded as the established law of the earlier part of the present century [1]. Their example has more recently been followed by Riquelme, Twiss, Phillimore, Halleck, and Negrin [2]. On the other hand, the ideas of Rousseau have undoubtedly become a commonplace of most of the recent continental writers [3]; but however valuable the opinion

qui en dérive, s'étendent aux citoyens paisibles et sans armes, aux habitations et aux propriétés privées, aux marchandises de commerce, aux magasins qui les renferment, aux chariots qui les transportent, aux bâtiments non armés qui les voiturent sur les rivières ou sur les mers, en un mot à la personne et aux biens particuliers.

'Ce droit, né de la civilisation, en a favorisé les progrès. C'est à lui que l'Europe a été redevable du maintien et de l'accroissement de prospérité, au milieu même des guerres fréquentes qui l'ont divisée,' &c. Quoted by Heffter note to § 119) from the Moniteur of Dec. 5, 1806.

The wars of Napoleon were hardly conducted in the spirit of this passage, which indeed may be suspected to have been only written for the purpose of casting odium upon the power which captured French ships, and upon which France was unable to retaliate.

[1] De Martens, Précis, § 263; Klüber, § 232; Kent, Comm. i. 55; Wheaton, Elem. pt. iv. ch. i. § 6; Manning, Commentaries on the Law of Nations (ed. 1875), p. 166.

[2] Riquelme, lib. i. c. 10; Twiss, ii. § 42; Phillimore, iii. § lxix; Halleck, i. 480; Negrin, Tratado Elemental de Derecho Internacional Maritimo, 141. The deliberate view of the government of the United States is shown by the 20th and 21st articles of the 'Instructions for the Government of Armies in the Field,' in which it is laid down that 'Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilised existence that men live in political, continuous societies, forming organised units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.' See also, for the doctrine of the American Courts, White v. Burnley, xx Howard, 249.

[3] For example, Bluntschli, Introd. p. 32 and §§ 530-1; Fiore, 11e ptie, ch. iii. ed. 1869; De Laveleye, Du Respect de la Propriété Privée, p. 26.

It is to be wished that the advocates of the new doctrine were more sensible than they are of the necessity of offering some proof in support of their assertion that it has replaced the previously existing law. They simply take for granted that the latter is exploded. M. Pradier Fodéré, in his notes to Vattel (iii. 132, ed. 1863), uses typical language in speaking of it

of some of these may be, it would be idle to put them in competition with the mass and continuity of authorities which are arrayed against them, unless it could be shown that practice has clearly anticipated their decision, or that it has recently changed to accommodate itself to their views.

(2) of usage.

Is, then, existing usage reasonably consistent with the theory in question, or has any improvement in practice taken place which can fairly be attributed to its influence? If individuals are not enemies as men, if they are not so even as subjects of the state, if they are enemies as soldiers only, or at most as officials or tax-payers, an enemy can have no right to interfere with the civil organisation of the hostile country, he can have no right of doing violence directly or indirectly to civilians, he can have no right to touch a shilling of their property or to derange their daily life by using for military purposes anything which belongs to them, he can have no right to treat them in his own country in any respect less favourably than in time of peace[1]. Yet not a single modern war has been made, except upon territory of which the population has been actively friendly to the invader, without every one of these things being done; and the pages of the writers who repeat the empty declamation of Portalis may be turned over in vain for a word which denies the right to do them. On entering his enemy's territory an invader replaces

as the 'erreur si étrangement adoptée par Vattel, et dont le droit des gens du xixe siècle a fait justice.'

[1] What is said above need not be pressed so far as to exclude from the list of enemies any one in the employment of the state or actually aiding it in any way, and it is of course to be understood that the property of the state itself, including the money payable in respect of ordinary taxes as it becomes due, may be seized by the enemy; but, on the most liberal construction, the language of M. Portalis can lead to nothing less than what is said in the text, thus guarded; and as the extract which has been given from his speech is repeated *ad nauseam* by the writers who follow him, it must be assumed to embody their views. M. Fiore indeed (ii. 270, ed. 1869) says, 'Tant que les sujets des divers états ne prennent pas personnellement part au combat, leurs droits et leurs biens personnels ne peuvent pas souffrir à cause des opérations de la guerre, dont les effets sont limités aux droits et aux propriétés publiques des nations belligérantes.' M. Bluntschli (p. 33) may not seem to go so far; but if he does not intend to do so, he is inconsistent with his own opinion as expressed in §§ 530–1.

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the civil government by military control, and makes any changes which are necessary for his safety and success; when he arrives before a fortress he not only bombards it without thought for the peaceable inhabitants, but he often directs his fire upon them and their houses instead of upon the fortifications, in order that the commander may be induced by their sufferings to surrender; the property of his enemy's subjects he seizes by way of contribution and requisition; he forces them to render him personal service in furtherance of his war; he destroys their buildings and cuts up their fields for military purposes; he stops farming work and the daily intercourse of the country by requisitioning carts and horses and monopolising the use of railways and canals; and during the continuance of the war he denies them the civil justice of his courts. Most of these and of similar acts, which are habitually done, are necessary to war, some of them are unnecessary; but all alike are incompatible with any reasonable application of the principle that individuals are not enemies.

Whether practice has been modified by the influence of the doctrine.

If, again, it is urged that practice, to whatever extent it may fall below a theoretical standard, has at least been improved since the introduction of the doctrine, the answer is simple. From the middle of the seventeenth century the laws of war have been continuously softened with the growth of humanity. It would be hard, and probably impossible, to show that a more marked or rapid change has occurred during the present century than during a former period of equal length; and even if such a change could be established, it would be more rational to attribute it to a reaction from the excesses of the Napoleonic wars, to the influence of a long peace, and above all to the general softening of modern manners, than to a principle, which has been seen to be at variance with practice, which perhaps is not seriously adopted even in theory in any country, except by writers, and which is certainly repudiated in England and the United States, the inhabitants of which may justly claim not to have less than the average amount of humane feeling.

Reasons for regard-

There are two reasons for which it is satisfactory to be able to

reject the doctrine of the separability of the individual from the state.

ing the doctrine as objectionable.

The first is that the doctrine is a fiction. International law rests no doubt in great part upon fictions. But they are fictions which have become in a sense realities by the degree to which they have seized upon the imaginations of peoples, and to which they have been acted upon for generations; in the main also they are antecedent to international law; they may have been strengthened by it; but to begin with they imposed themselves upon it. New fictions are in a different position. As obvious unrealities they are destitute of inherent force, and they consequently ought never to be lightly introduced. In the present case it is impossible to draw a real distinction between the public and private aspects of the individual. The state is made up of the sum of the individuals belonging to it, and its will is the sum of their wills. It is by pressure of different kinds which is brought to bear upon them individually that the state is compelled to submit to a victor. To separate individuals theoretically from the state in respect of a number of interests, which are nevertheless recognised in universal practice as giving a fair hold for putting stress upon it, is simply to ignore facts. To separate the state from the individuals which compose it is to reduce it to an intangible abstraction.

The second reason is that the doctrine is mischievous. It is the argumentative starting-point of attack upon the right of capture of private property at sea. Whatever from certain points of view may be the merits of this question, it is inconvenient, to say the least of it, that the discussion as to the propriety of retaining the right should be placed upon a false basis, and that by the quiet assumption of an inadmissible principle the semblance of a justification should be obtained for branding a practice as an iniquitous contravention of rule, which in reality is in harmony with the ground principles of the laws of war. Still more objectionable is its effect upon the legal position of the inhabitants of a militarily occupied country. If they are

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not enemies they have no right of resistance to an invader; the spontaneous rising of a population becomes a crime; and the individual is a criminal who takes up arms without being formally enrolled in the regular armed forces of his state. The customs of war no doubt permit that such persons shall under certain circumstances be shot, and there are reasons for permitting the practice; but to allow that persons shall be intimidated for reasons of convenience from doing certain acts, and to mark them as criminals if they do them, are wholly distinct things. A doctrine is intolerable which would inflict a stain of criminality on the defenders of Saragossa [1].

[1] In speaking upon this point in 1874, Baron Lambermont, one of the Belgian delegates at the Conference of Brussels, said, 'Il y a des choses qui se font à la guerre, qui se feront toujours, et que l'on doit bien accepter. Mais il s'agit ici de les convertir en lois, en prescriptions positives et internationales. Si des citoyens doivent être conduits au supplice pour avoir tenté de défendre leur pays au péril de leur vie, il ne faut pas qu'ils trouvent inscrits sur le poteau au pied duquel ils seront fusillés l'article d'un traité signé par leur propre gouvernement qui d'avance les condamnait à mort.' Parl. Papers, Miscell. No. 1, 1875, p. 92. The efforts of some of the great military powers at the Conference to suppress the right of a population to defend itself were so sturdily resisted by several of the minor states that the draft rules originally proposed were modified, as a result of the discussion which took place, in a sense favourable to the right.

CHAPTER IV

GENERAL PRINCIPLES OF THE LAW GOVERNING BELLIGERENTS AND NEUTRALS IN THEIR RELATIONS WITH EACH OTHER

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How the special law of neutrality has been formed.

The rudimentary propositions of international law contemplate no other relations than those of war and peace. At a time when the relations of countries in amity with one another were the subject of elaborate rule, and when the violence of war was already limited by definite customs, neutrality had no existence. If hostilities broke out between two states, every other was an ally or an enemy. Little by little a third attitude became recognised as possible and legitimate; and its maintenance has gradually been transformed into a duty by the jealousy of belligerents, whose anxiety to deprive their enemy of advantages which the preference of the neutrals might give to him has been helped by the equal anxiety of neutrals to continue their habits of trade and intercourse. A code of rules has grown up affecting states in their new relations, which in part is the accidental result of the immediate collision of interests of various strength, in part is a fair deduction from the principles of the law governing states in their normal relations, and in part represents a compromise between conflicting deductions from those principles and from the rights which belligerents are conceived to possess as against their enemies. As these last-mentioned principles and rights are equally starting-points in law, and as they contemplate the contradictory states of war and peace, and have no inherent reference to any third relation in which countries can stand to one another, any compromise arrived at between them may be expected to be rough. As a matter of fact, not only is the usage which governs the conduct of neutrals and belligerents often inconsistent with itself, but there are even

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two broadly divided tendencies of opinion as to its right basis, of which one prefers the interests of the neutral and the other those of belligerents.

However unfortunate the existence of these divergent tendencies may be, they are equally defensible theoretically on the fundamental principles with which the law of neutrality is bound to conform; and as it is beyond the province of the international lawyer to settle precedence between the interests of neutrals and belligerents, he must leave to moralists and to statesmen the task of deciding which of the two are the more worthy of encouragement, and therefore which theoretic tendency is to be preferred.

The rudimentary principle of the law of neutrality. Duty of impartial conduct.

It is a reasonable, and indeed a necessary, deduction from the principle that a state is bound to respect the right of free action possessed by other states, that it must not allow feelings of friendship for a country to betray it into embarrassing an enemy of the latter in the exercise of his legitimate rights of war. It has been mentioned as an incident of sovereignty that every people possessing sovereignty has the right of determining what kind and amount of intercourse it will maintain with foreign nations, and that it may choose to mark out one as an object for greater friendship than another. In time of peace it is easy to accord such preference, and to remain, nevertheless, on terms of perfect amity with less favoured countries. But during war, privileges tending to strengthen the hands of one of two belligerents help him towards the destruction of his enemy. To grant them is not merely to show less friendship to one than the other; it is to embarrass one by reserving to the other a field of action in which his enemy cannot attack him; it is to assume an attitude with respect to him of at least passive hostility. If therefore a people desires not to be the enemy of either belligerent, its amity must be colourless in the eyes of both; in its corporate capacity as a state it must abstain altogether from mixing itself up in their quarrel.

In the oldest and most rudimentary form of the theory of

neutrality this principle was fully recognised. But when once its dictates had been satisfied, the duties of a state were, for all practical purposes, supposed to end.

Territorial sovereignty as a source of neutral responsibility.

Gradually, as the theory of neutrality was worked out, it came to be thought that a neutral state is not merely itself bound to refrain from helping either of two belligerents, but that it is also bound to take care to a reasonable extent that neither one nor the other shall be prejudiced by acts over which it is supposed to have control. States become affected by the duty of responsibility which is correlative to the fact of sovereignty. Sovereign states being in possession of the sole right to decide what acts shall or shall not be openly done within their territory, all countries are supposed to be jealous of any infringement of that right; and no stranger being able to look behind the fact of sovereignty, they are supposed to be capable of securing that it shall be respected. It would neither be likely, nor is it found to be the fact, that nations, in matters connected principally with their own interests, regard with patience any exercise of authority or of force within their territories independently of their own sanction. If therefore a people is found to acquiesce in conduct injurious to its friends; if it permits a belligerent to use its lands or its harbours as the scene of hostile action, or the basis of hostile preparation, a violent presumption is raised that its neutrality is unreal, and that it deliberately intends under the mask of equal friendship to help the belligerent who has committed an unpunished offence.

The reasoning which applies to strangers applies also to subjects. As the presumption that a sovereign has control over avowed acts done within his dominions is still stronger in the case of subjects than of foreigners, if any acts are done by them which are in opposition to his declared policy, it is easier to believe the declaration to be false than the power to be inadequate. *Primâ facie* everything which they do is permitted by him.

On the other hand, it is admitted that no government can

exercise an inquisitorial surveillance over all the doings of persons living within its jurisdiction. There is a point at which the responsibility of a state ceases in respect of concealed acts. What this point is will be a subject for consideration later.

In all this it is evident that the duties of a neutral state are identical with those of a state in a time of universal peace. It is at peace with both the parties to a war; it must therefore fulfil its pacific duties with respect to them. The only difference in the position of a state in the two cases of peace and neutrality is that the range and frequency of the occurrences which call for the fulfilment of duty in time of war is greater than in time of peace. In peace, attempts to use the territory of a state to the injury of another state are only made by private persons and are rare, in war they may be made by a belligerent state itself as well as by its subjects, and they may occur at any moment. A state may therefore be reasonably expected to show somewhat more watchfulness as a neutral than can be demanded from it in a season of apparent tranquillity.

Territorial sovereignty as the measure of neutral responsibility.

As territorial sovereignty brings with it duties, so it supplies the measure of neutral responsibility. A state cannot be asked to take cognizance of what occurs outside its own borders. In another country it obviously cannot act. On the sea it is not required to act, both because its jurisdiction, being confined to its own ships, is inadequate, and because it would be beyond the power of any state to supervise the actions of its subjects, or of persons who may have made improper use of its territory, on all the oceans of the world. A state therefore washes its hands of responsibility at the edge of its territorial waters. Of whatever hostile conduct its subjects, or other persons issuing from its shores, may be guilty, the remedy of a belligerent is upon them personally, and not upon the nation to which they belong or the territory of which they may have used.

Rights of belligerents in restraint of com-

Connected with the cessation of state control at the frontier of state territory, though not springing from it, is a privilege of interference with neutral commerce which belligerents have

mercial acts of individuals.

been allowed to establish. Much of the trade which is ordinarily carried on between states, and which they have a right to carry on with whom they choose in virtue of their general right of self-development, is incompatible with the successful conduct of warlike operations. An army cannot permit free ingress into a besieged town, or egress from it. The stress put upon a country by blockade would be nullified if neutral merchants were allowed to bring in everything that the blockaded state might want. And there are kinds of merchandise, the supply of which to a belligerent, owing to their direct usefulness in war, is peculiarly injurious to his adversary. It is considered that the harm done to a belligerent by noxious trade is so great as to outweigh the loss inflicted upon a neutral by interruption or restriction of his commerce. A belligerent consequently is held to have a right to exact that trade which is injurious to his operations shall be restrained. There are only two ways in which this can be effected. Either the neutral sovereign may be responsible for the conduct of his subjects, or the belligerent may himself be entrusted with the necessary power. The grave and obvious inconveniences inseparable from the former method[1] would have secured its rejection if the impatience of belligerents had not denied it the opportunity of trial; but the actual practice in fact arose because it was easy for the belligerent to protect himself by summary action, while it was not easy for the neutral sovereign to give him an equal security.

[1] 'No power can exercise such an effective control over the actions of each of its subjects as to prevent them from yielding to the temptations of gain at a distance from its territory. No power can therefore be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more convenient to entrust the party injured by such aggressions with the power of checking them. This arrangement seems beneficial to all parties; for it answers the chief end of the law of nations,—checking injustice without the necessity of war. Endless hostilities would result from any other arrangement. If a government were to be made responsible for each act of its subjects, and a negotiation were to ensue each time that a suspected neutral merchantman entered the enemy's port, either there must be a speedy end put to neutrality, or the affairs of the belligerent and neutral must both stand still.' Lord Brougham's Works, ed. 1857, viii. 386.

The origin of the privilege was lawless, but existing custom fortunately gives effect to a real distinction which separates non-neutral acts, with which the state is identified, from commercial acts done by individuals from which a belligerent suffers.

Distinction between state acts and commercial acts of the individual.

An act of the state which is prejudicial to the belligerent is necessarily done with the intent to injure; but the commercial act of the individual only affects the belligerent accidentally. It is not directed against him; it is done in the way of business, with the object of getting a business profit, and however injurious in its consequences, it is not instigated by that wish to do harm to a particular person which is the essence of hostility. It is prevented because it is inconvenient, not because it is a wrong; and to allow the performance by a subject of an act not in itself improper cannot constitute a crime on the part of the state to which he belongs. Trade between a neutral individual and a belligerent, which is prejudicial to the operations of a country at war, not being in itself wrong, even in the qualified sense in which non-neutral national acts can be said to be wrong, the belligerent right to interfere with it is theoretically a derogation from the strict rights of the neutral state, which refrains in so far as its subjects are affected by the belligerent from protecting them in the performance of innocent acts. The justification of this usage lies in its convenience.

The belligerent is allowed to control the latter directly.

By existing custom the belligerent has the right of hindering neutral commerce when it is noxious to him, either because it supplies his enemy with articles of direct use in war, or because it diminishes the stress which he puts upon his enemy; or even because it is tainted by association with hostile property. In all these cases the neutral trader is left face to face with the belligerent nation. It alone determines whether he has infringed its privileges, and in its courts alone can he in the first instance find a remedy for wrongs done to him by its agents. The neutral state cannot interfere until the belligerent has overstepped the boundary of his rights. When he has done this by rendering unjust decisions, the question transfers itself to

another head of international law. The belligerent has practically committed an act of war, and the neutral state can demand and exact such reparation as may be needful.

Division of the law of neutrality into two branches.

It appears, then, that international usage as between belligerents and neutrals consists of two branches, distinct in respect of the parties affected, of the moral relation of these parties to each other, and of the means by which a breach of the accepted rules can be punished.

1. That affecting states in their relation to one another.

In one the parties are sovereign states. Both of these are affected by the same duties as in peace time. The belligerent therefore remains under an obligation to respect the sovereignty of the neutral; the neutral is under an equal obligation not to aid directly or indirectly, and within certain limits to prevent a state or private persons from aiding in places under his control, the enemy of the belligerent in matters immediately bearing on the war. If a wrong is done, the remedy is of course international.

2. That affecting states and individuals in their relation to one another.

In the other the parties are the belligerent state and the neutral individual. They are, and can be, bound by no obligations to each other. The only duty of the individual is to his own sovereign; and so distinctly is this the case, that acts done even with intent to injure a foreign state are only wrong in so far as they compromise the nation of which the individual is a member. At the same time the only duty of the belligerent state is to beings of like kind with itself; and it is merely bound to behave in a particular manner to the neutral individual because of the international agreement which sets limits to the severity which may be used in repressing his noxious acts. But within these limits the belligerent is irresponsible. He exacts in his own prize-courts the penalty for infraction of the rules which he is allowed to enforce; and if he inflicts a wrong, it is for him to repair it.

The two branches are sometimes con-

This distinction between the usages affecting national and private acts is deeply rooted in the habits of nations. At no time since the rules which make up international law assumed

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definite shape has there been any room for question as to the existence or nature of an authoritative practice in the matter. But the usage was shaped in the first instance by the blind working of natural forces, and its permanence is more due to their continued operation than to the clearness with which its principle has been defined by legal writers. It has been, and still is, usual for them to confuse neutral states and individuals in a common relation towards belligerent states; and in losing sight of the sound basis of the established practice they have necessarily failed to indicate any clear boundary of state responsibility. This want of precision is both theoretically unfortunate, and not altogether without practical importance. For it has enabled governments from time to time to put forward pretensions, which though they have never been admitted by neutral states, and have never been carried into effect, cannot be often made without endangering the stability of the principles they attack. But the common sense of statesmen has generally met such pretensions with a decided assertion of the authoritative doctrine, and state papers are not wanting in that clearness which is deficient in the writings of jurists.

1777, French statement of the law.

In 1777 M. de Vergennes, in his observations on the celebrated English 'Mémoire Justificatif' of that year, said that 'it will be found, whether by consulting usage or treaties, not that trade in articles contraband of war is a breach of neutrality, but that the persons engaged in it are exposed to the confiscation of their goods[1].' When England suggested to the United States in 1793 that the government of that country 'will deem it more expedient to prevent the execution of the President's Proclamation than to expose vessels belonging to its citizens

1793, American statement of the law.

[1] De Martens, Causes Célèbres du Droit des Gens, iii. 247. The correctness of M. de Vergennes' law is not affected by the circumstance that the facts in the particular case do not seem to have been altogether covered by the principle which he stated. The exportations of articles contraband of war of which the English government complained, were chiefly made by a body of persons who owned privateers, sailing under the American flag, but fitted out in French ports, and manned by Frenchmen. In such a case exportations of arms might fairly be taken as part of a series of hostile operations.

to those damages which may arise from their carrying articles of the description above-mentioned,' Mr. Jefferson answered, 'Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace does not require from them such an internal derangement of their occupation[1].' Again, in 1855, President Pierce, speaking of articles contraband of war, laid down more plainly 'that the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government[2].'

1855, American statement of the law.

In unfortunate contrast with these frank expressions of the clear rule of law was the doctrine maintained by the United States during the civil war, and afterwards before the tribunal of arbitration at Geneva. It was then urged that though belligerents may not 'infringe upon the rights which neutrals have to manufacture and deal in military supplies in the ordinary course of commerce,' yet that 'a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies[3];' in other words, it was argued

The two branches of law confused; recently by the United States and Germany.

[1] Mr. Jefferson to Mr. Hammond, May 15, 1793.

[2] President Pierce's Message, 1st Session 34th Congress.—Among jurists Kent (Comm. lect. vii) and Ortolan (Dip. de la Mer, ii. 177) are distinguished by their clear recognition of the principle involved in the established practice. See also the judgment of Story in the case of the Santissima Trinidad, vii Wheaton (American Reports), 340.

[3] Case of the United States, part v.

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that the character of contraband trade alters with the scale upon which it is carried on. In like manner, during the Franco-German war of 1870, Count Bismarck accused the British Government of not acting 'in conformity with the position of strict neutrality taken by it,' in permitting contracts to be entered into by the French Government with English houses for the supply of arms and ammunition[1]. These claims are reflected in the language of M. Bluntschli, who declares that while 'the neutral state cannot be asked to prevent the issue in small quantities of arms and munitions of war, it is altogether different with wholesale export. The latter gives a sensible advantage to one of the two parties, and in the larger number of cases is in fact a subsidy[2].'

In 1801, by England.

Sometimes an inverse confusion occurs to that which is made in the above instance. In 1801 an English frigate seized some Swedish vessels at Oster Risøer, within Norwegian waters. Lord Hawkesbury expressed the regret of the English Government that the Danish sovereignty had been violated, but failed to see that the international illegality of the capture required the application of an international remedy; and professing that the government had no power to restore the ships, referred the aggrieved parties to the courts[3].

In 1793, by France.

Again, in 1793, on the outbreak of war between Great Britain and France, the latter power endeavoured to use the territory of the United States as a base of operations against English commerce, and fitted out privateers in American ports. While measures were being taken to put a stop to these proceedings, the American Ministry had before it the question in what manner prizes

[1] Lord Augustus Loftus to Earl Granville, July 30, 1870; State Papers, lxx. 73. See also Lord Granville's despatch of August 3, id. 76.

[2] Droit International, § 766.

[3] Count Wedel-Jarlsberg, the Danish Minister of Foreign Affairs, declared that his sovereign 'would never consent that the open violation of his territory should be submitted under any pretext whatever to the decision of the courts.' In the end Lord Hawkesbury receded from his pretension, and the ships were given up. Ortolan, Dip. de la Mer, Annexe F. ii. 427–33, where the text of the correspondence is to be found.

should be dealt with which had been taken before the issue of commissions by the French Minister had been expressly prohibited. Mr. Hamilton thought that the prizes, having been taken in derogation of the sovereignty of the United States, the question of the restoration was a national one; but Mr. Jefferson contended that if the commissions issued by the French Minister were invalid, and the captures were therefore void, the courts would adjudge the property to remain in the former owners; and there being an appropriate remedy at law, it would be irregular for the Government to interfere[1]. It was finally decided to leave the British owner to such remedy as the courts might give him, and the United States only acknowledged an international liability in respect of vessels captured after formal notice to the French Minister that the equipment of cruisers would be looked upon as an infraction of neutrality.

[1] Marshall's Life of Washington, ii. 263-5.

PART II

CHAPTER I

COMMENCEMENT OF THE EXISTENCE OF A STATE, CHANGES IN THE STATE PERSON, AND EXTINCTION OF A STATE

Recognition of a state.

THEORETICALLY a politically organised community enters of right, as was before remarked, into the family of states and must be treated in accordance with law, so soon as it is able to show that it possesses the marks of a state. The commencement of a state dates nevertheless from its recognition by other powers; that is to say, from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone. For though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognised does really possess all the necessary marks, and especially whether it is likely to live. Thus although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Whether the effects of recognition by a parent state and by third powers are different.

Apart from the rare instances in which a state is artificially formed, as was Liberia, upon territory not previously belonging to a civilised power, or in which a state is brought by increasing civilisation within the realm of law, new states generally come into existence by breaking off from an actually existing state. In the latter case recognition may be accorded either by the parent country or by a third power, and it is sometimes thought that there is a difference of kind between the recognition which is given by the one and that which proceeds from the other. Sir James Mackintosh, in his speech on the recognition of the Spanish American States, regarded the word 'recognition,' when

applied to the acts of the parent state and of other states respectively, as being 'used in two senses so different from each other as to have nothing very important in common,' and Canning held a similar view[1]. With all deference for such high authority, it is not easy to see in what the difference for legal purposes consists. Of course recognition by a parent state, by implying an abandonment of all pretensions over the insurgent community, is more conclusive evidence of independence than recognition by a third power; and it removes all doubt from the minds of other governments as to the propriety of recognition by themselves; but it is not a gift of independence; it is only an acknowledgment that the claim made by the community to have definitively established its independence, and consequently to be in possession of certain rights, is well founded. But recognition by a third power amounts also to this. Practically, no doubt, the difference in the value of the evidence furnished by recognition in the two cases is not unimportant. When a state has itself recognised the independence of a revolted province it cannot pretend that recognition by other states is premature. When it has not done so, it may often be possible for it to bring the conduct of other states into question, and to argue that recognition has not been justified by the facts; and where any colour exists for such an assertion, the state which has recognised an insurgent community is placed in a false position. Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition therefore is a wrong done to the parent state; in effect indeed it amounts to an act of intervention. Hence great caution ought to be exercised by third powers in granting recognition; and, except where reasons of policy interfere to prevent strict attention to law, it is seldom given unless in circumstances which set its propriety beyond the reach of cavil.

[1] Mackintosh, Miscellaneous Works, 749 (ed. 1851); Hansard, New Series, xi. 1397.

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Circumstances under which recognition may be accorded by third powers.

Most text writers are somewhat loose in their treatment of the circumstances in which recognition may be accorded by third powers. They either, like Klüber, bring in the question of the legitimacy of the origin of the new state, which must always be open to differences of opinion, or, like Wheaton, speak with a vagueness which renders it impossible to be sure of their meaning[1]. The true principles of action are best illustrated by the conduct of England and the United States with respect to the South American Republics, and in the debates which took place in Parliament when the question of their recognition was considered.

Case of the South American Republics.

In 1810 insurrections broke out over the whole of Spanish America. That which took place in Buenos Ayres was immediately successful, the efforts made by Spain to recover a footing in the country did not even lead to its invasion, and it formally declared its independence in 1816. Elsewhere a struggle was maintained for several years with various fortune, but already in 1815 onlookers could forecast its issue[2], and from 1818 Chile, which declared its independence in that year, remained unmolested. Things being in this state, Mr. Clay in the latter year laid before Congress a motion in favour of recognition. Notwithstanding that several provinces were completely freed from the Spaniards, and that they had enjoyed undisturbed independence during a considerable time, the permanence of the existing order was not thought to be sufficiently assured in any part of the continent, so long as the mother country had a reasonable chance of success in places which, if subdued, would serve as bases of operations against the remainder, or the recovery of which would liberate her forces for use else where. The motion was consequently rejected by a large majority. It was not till 1822, when Colombia had expelled the Spaniards, with the exception of the small garrisons of two blockaded forts, while the position of Chile and Buenos Ayres remained unchanged, that President Monroe felt that he could

[1] Klüber, § 23; Wheaton, Elem. pt. i. ch. ii. §§ 7, 10.

[2] Annual Register for that year, p. 128.

disregard the continuance of the struggle in Peru, and declared in his message to Congress that the 'contest had reached such a stage, and been attended with such decisive success on the part of the provinces, that it merits the most profound consideration whether their right to the rank of independent states is not complete.' On the matter being referred to the Committee of the Senate on Foreign Affairs, a report in favour of recognition was drawn up, in which, it may be noticed, the principle was affirmed that 'the political right of the United States to acknowledge the independence of the Spanish American Republics, without offending others, does not depend upon the justice but on the actual establishment' of that independence. Recognition followed shortly afterwards[1]. By England still greater deliberation was displayed. It was only in 1824, when it could be asked, 'What is Spanish strength?'—and the answer was, 'A single castle in Mexico, an island on the coast of Chile, and a small army in Upper Peru,' that the question of recognition was considered ripe to be seriously taken in hand. Even then

[1] Mr. Adams, Secretary of State, writing to President Monroe in 1816, pointed out admirably the considerations of law, of morals, and of expediency which are involved in recognition. 'There is a stage,' he said, 'in revolutionary contests when the party struggling for independence has, I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as a matter of fact, so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must of course judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly against France in our revolution, and substantially against Holland. If war results in point of fact from the measure of recognising a contested independence, the moral right or wrong of the war depends on the justice and sincerity and prudence with which the recognising nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favour, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorise a neutral to acknowledge a new and disputed sovereignty.' MS. quoted by Wharton, Digest of the International Law of the United States, § 70.

PART II CHAP. I Lord Liverpool and Mr. Canning were hardly prepared to entertain it; and the debates of the spring of that year were not followed by the recognition of Buenos Ayres, Colombia, and Mexico till the beginning of 1825. The recognition of Chile was postponed because of the instability of its internal condition. The British Government may perhaps have been unduly slow to be convinced that the South American Republics had in fact definitely achieved their independence; but whether they were right or wrong upon the question of fact, and whatever differences of opinion upon this point may have shown themselves during the debate, the government and the opposition were thoroughly at one upon the question of principle. The language of Lord Liverpool, as being more concise than that used by other speakers, may be quoted to show the views of Mr. Canning, of Lord Lansdowne, and of Sir J. Mackintosh, as well as of himself. 'He had no difficulty,' he said, 'in declaring what had been his conviction during the years that the struggle had been going on between Spain and the South American provinces—that there was no right while the contest was actually going on... The question ought to be—was the contest going on? He, for one, could not reconcile it to his mind to take any such step so long as the struggle in arms continued undecided. And while he made that declaration he meant that it should be a *bona fide* contest[1].'

[1] De Martens, Nouv. Rec. vi. 148, 154; Hansard, New Series, x. 974 and 999, xi. 1344; Annual Register. The principle upon which the British and American governments acted in the case of the South American Republics was reaffirmed by Lord Russell in refusing an application for recognition made by the Confederate States in 1862. Lord Russell to Mr. Mason, Aug. 2, 1862. State Papers, North America, No. 2, 1863.

Sir W. Harcourt (Letters of Historicus, Nos. i, ii and iii) examines the doctrine of recognition, and analyses the precedents in detail, with reference to the question whether it would have been proper to recognise the Confederate States during their struggle for independence. He shows that several cases, such as those of Belgium and Greece, which are often spoken of as instances of mere recognition, are in fact instances of intervention. The recent recognition of the independence of Servia and Roumania by the Great Powers may be placed in the same category. Recognition in the case of these states was only a part of arrangements made and imposed by the

Summary of conditions under which independence cannot and can be recognised.

Assuming that the recognition of the Spanish American Republics by the United States and England may be taken as a typical example of recognition given upon unimpeachable grounds, and bearing in mind the principle that recognition cannot be withheld when it has been earned, it may be said generally that—

1. Definitive independence cannot be held to be established, and recognition is consequently not legitimate, so long as a substantial struggle is being maintained by the formerly sovereign state for the recovery of its authority; and that

2. A mere pretension on the part of the formerly sovereign state, or a struggle so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained, is not enough to keep alive the rights of the state, and so to prevent foreign countries from falling under an obligation to recognise as a state the community claiming to have become one.

Modes in which recognition is effected.

Recognition may be effected in very various ways. The most formal mode is by express declaration, issued separately, and addressed to the new state, or by a like declaration included in a convention made with it. The former was the method adopted by the British government in recognising the Congo state; the latter was that preferred for the same purpose by the German government. But any act is sufficient which clearly indicates intention. The independence of Greece was recognised by Great Britain, France, and Russia in a protocol, dealing besides with other matters; and the empire of Germany was also recognised by a protocol of the 24th January, 1871, signed by the plenipotentiaries of Great Britain, Austria, France, Italy, North Germany (Germany), Russia and Turkey, accredited to the Conference of London. Belgium received recognition by being admitted as a party to a treaty of which the Great Powers were the other

Great Powers for the general settlement of the South-East of Europe. It was this fact which justified those powers in making the recognition of Roumania dependent on changes being made in its municipal laws, and in postponing it until those changes had been effected. For the circumstances in which intervention is permissible, see pt. ii. ch. viii.

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signatories. Again the official reception of diplomatic agents accredited by the new state, the dispatch of a minister to it, or even the grant of an exequatur to its consul, affords recognition by necessary implication [1].

The formation of the Congo state.

The formation of the Congo state deserves separate notice as a curious case of abnormal birth. In 1879 a body was formed calling itself the International Association of the Congo, which was presided over by the King of the Belgians acting as a private individual, and of which the members and officials were subjects of civilised states. It founded establishments; it occupied territory; it obtained cessions of sovereignty and suzerainty from native chiefs. Yet it was neither legally dependent upon any state, nor did its members reject the authority of their respective governments, and establish themselves permanently on the soil as a *de facto* independent community. At first the Association held itself out as a sort of agency for erecting, fostering, and apparently superintending, free states in the Congo basin; and while claiming only to exercise these transitory functions its flag was recognised in April 1884 by the United

[1] Hertslet's Map of Europe by Treaty, Nos. 149, 152 and 441; Wharton's Digest, iii. § 115; Parl. Papers, Africa, No. 4, 1885. The treaty to which Belgium was a party was that through which its boundaries were defined and its position as a neutral state established by the Great Powers, but its admission as an independent party must be regarded as an act prior, from the legal point of view, to the adoption of agreements which would otherwise have conferred recognition. Holtzendorff (Handbuch, i. § 8) gives the surrender of criminals to a new state as an act sufficient to effect recognition; it does not however seem quite clear why the surrender of an ordinary criminal to a *de facto* government, in the possession of regular courts, need more necessarily constitute recognition, than does recognition of belligerency. Both acts imply recognition that jurisdiction is being in fact exercised, and acknowledge it as a matter of political or social convenience. Neither act need mean more.

The appointment of consuls to a community claiming to be independent does not constitute recognition. In 1823 consuls were appointed by Great Britain to the South American Republics, and the various governments were informed that the appointments had been made for the protection of British subjects, and for the acquisition of information which might lead to the establishment of friendly relations. The various consuls took up their appointments and acted, but were not gazetted. The earliest recognition took place in 1825.

States as that of a 'friendly government.' Germany concluded a convention with it in November, 1884, in which the Association appears as itself definitively exercising sovereignty, and is recognised as a 'friendly state.' In December of the same year, in an exchange of Declarations with Great Britain, it asserted that by virtue of treaties with native '"sovereigns," the administration of the interests of free states established or being established in the basin of the Congo and in adjacent territories was vested in the Association,' and Great Britain recognised its flag as that of a friendly government. Within the next two months Italy, the Netherlands, Spain, France, Russia, and Portugal had recognised the Association as a government; Austria, Sweden and Norway, and Denmark had acknowledged it to be a state; and Belgium placed 'its flag on an equality with that of a friendly state.' Finally, on the 26th February, 1885, Col. Strauch, acting under full powers conferred upon him by the King of the Belgians, was permitted by the states represented at the Conference of Berlin to signify the adhesion of the Association, as an independent state, to the general act of the Conference.

Subsequent occurrences have invested the state, thus strangely brought into the world, with a more regular form. In April 1885, the King of the Belgians, who by the constitution of his country is incapable of being the chief of another state without the consent of the Belgian Chambers, was duly authorised to assume the sovereignty of the Congo state, on condition that its union with Belgium should be merely personal; and shortly afterwards he proclaimed by royal decree the existence of an independent Congo state, and his own accession to the throne[1].

[1] Parl. Papers, Africa, No. 4, 1885; Moynier, La Fondation de l'État Indépendant du Congo au point de vue juridique.

It may be worth while to notice here a somewhat curious incident, which offers points of interest, but which does not conveniently fall under any of the heads which will present themselves for discussion in the text. In 1894 an Agreement was entered into between Great Britain and the Congo state by which a strip of territory twenty-five kilometres in breadth, extending from Lake Tanganika to Lake Albert Edward, and running close to the

 [Of late years the King has shown every disposition to facilitate the union of the two countries. In 1889 he executed a will by

German frontier for the greater part of its length, was granted by the Congo state to Great Britain upon lease and to be subject to British administration, so long as the Congo territory remained under the sovereignty of the King of the Belgians either as an independent state or as a colony; it was declared that Great Britain neither had nor sought to acquire any further political rights in the leased territory than those which were in conformity with the Agreement. To this arrangement the German Government objected on the ground that an indefinite lease is equivalent to a cession, and that therefore 'her political position would be deteriorated and her direct trade communication with the Congo state would be interrupted.' It was more important to Great Britain to avoid disagreement with Germany than to maintain a right to the leased territory; the agreement with the Congo state was consequently rescinded; but the abstract question of the validity of the objection taken by the German Government remains open.

That the direct trade communication between the German protectorate and the Congo state would in a geographical sense be interrupted is undeniable; but the fact was immaterial. Great Britain could only receive a lease of the territory subject to the provisions of antecedent treaties made between the Congo state and Germany, and notwithstanding a slight ambiguity in the language of the treaty made in 1884 between the two states, there can be no doubt that she would have been precluded from levying duties upon goods imported from German sources. As regards the general 'political position,' the Congo state is neutral, and the treaty provides that in the event of cession of any part of its territory 'the obligations contracted by the Association' (i. e. the Congo state) 'towards the German Empire shall be transferred to the occupier.' Assuming then for a moment that a lease of indefinite duration is equivalent to a cession, the territory leased to Great Britain would have remained affected by the duties of neutrality, and could not have been used to prejudice the position of Germany. The treaty, it should be added, contains no stipulation, express or implied, that transfer of territory in any form should be dependent on German consent. It is difficult therefore to understand the conventional basis of the objection taken, and of legal basis in a wider sense it is evidently destitute. The Congo state has all rights of a neutral state, of which it has not been deprived by express compact. Those rights beyond question include the right to do all state acts which neither compromise, nor tend to compromise, neutrality. In the particular case the Congo state was clearly competent to grant a lease, because the lease carried with it of necessity the obligations of neutrality. Although a lease for an indefinite time may in certain aspects be the equivalent of a cession, in law it is not so; a state may be able to make a cession of territory freed from its own obligations, but in granting a lease it cannot give wider powers than it possesses itself, and consequently, altogether apart from the treaty with Germany, the Congo state could not disengage territory from neutral obligations by letting it out upon a subordinate title.

It may be remarked that the Congo state is equally competent to acquire

which he bequeathed the Congo state to Belgium and let it become known, that if it suited the latter power to enter, during his lifetime, into closer relations with his Congo possessions, he should offer no opposition. In 1895 a Treaty of Cession was drawn up between Representatives of Belgium and the Congo state, but the Bill seeking the sanction of the Legislature for this arrangement was abruptly withdrawn and the question of annexation remains indefinitely postponed.]

Relation of a new state to the contract rights and obligations, &c. of the parent state.

When a new state splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question therefore presents itself with respect to the general rights and duties of a new state. What however is its relation to the contract obligations of the state from which it has been separated, to property belonging to and privileges enjoyed by the latter, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new state?

Personal rights and obligations, &c. adhere to the parent state.

The fact of the personality of a state is the key to the answer. With rights which have been acquired, and obligations which have been contracted, by the old state as personal rights and obligations the new state has nothing to do. The old state is not extinct; it is still there to fulfil its contract duties, and to enjoy its contract rights. The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted; they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have

by way of lease, because the territory so acquired can at least be invested with a neutral character at the will of the Congo state, and probably must of necessity be considered, for such time as the connexion lasts, to be a temporary extension of the neutral territory.

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accepted on its own account. What is true as between the new state and foreign powers, is true also as between it and the old state. From the moment of independence all trace of the joint life is gone. Apart from special agreement no survival of it is possible, and the two states are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old state continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property, and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it.

Local rights and obligations, &c. are transferred to the new state.

On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and has therefore a local character, or which, though not within it, belongs to state institutions localised there, transfer themselves to the new state person. Conversely, of course, the old state person remains in sole enjoyment of its separate territory, and of all local rights connected with it.

Thus treaties of alliance, of guarantee, or of commerce are not binding upon a new state formed by separation, and it is not liable for the general debt of the parent state; but it has the advantages of privileges secured by treaty to its people as inhabitants of its territory or part of it, such as the right of navigating a river running through other countries upwards or downwards from its own frontier; it is saddled with local obligations, such as that to regulate the channel of a river, or to levy no more than certain dues along its course; and local debts, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it. If debts are secured upon special revenues derived from both sections of the old state—if, for example, they are secured upon the customs or excise, they are evidently local to the extent that the hypothecated

revenues are supplied by the two sections respectively; they must therefore be proportionately divided. Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the state, and the like. When a portion of the lands belonging to a commune or to an endowment lies without the boundary of the new state it is only considered that a right to the value of the property is transferred. Convenience may dictate expropriation from the property itself, and it is only then necessary to pay its full value by way of compensation[1].

[1] Bluntschli, §§ 47, 55-60; Fiore, Trattato di Diritto Internazionale Pubblico, §§ 346-56.

The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete, and they tend to copy one another. Grotius, for example, says that if a state is split up 'anything which may have been held in common by the parts separating from each other must either be administered in common or be rateably divided;' De Jure Belli et Pacis, lib. ii. c. ix. § 10. Kent (Comm. i. 25) does little more than paraphrase this in laying down that 'if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.' Phillimore quotes Grotius and Kent, and adds, 'if a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, rateably binding upon the different parts.' i. § cxxxvii. It is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the fractions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them; but the obligation is a moral, not a legal one. The fact remains that the general debt of a state is a personal obligation. The case also of the creation of a new state out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part

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Case of British American fisheries.

Some controversies have occurred which illustrate the forms in which questions arising out of the application of the above principles may present themselves. Of these the following may be instanced. Upon the separation of the United States from England the treaty of 1783 secured to the subjects of the former certain fishery privileges upon the coasts of Newfoundland, Nova Scotia, and Labrador. After the war of 1812 it was a matter of dispute whether the article dealing with these privileges was merely regulatory, or whether it operated by way of grant, its effect being in the one case merely suspended by war, while in the other the article was altogether abrogated. On the part of the United States it was argued that the treaty of 1783 recognised the right of fishery, of which it is the subject, as a right which, having before the independence of the United States been enjoyed in common by all the inhabitants of the British possessions in North America as attendant on the territory, remained attendant after the acquisition of independence upon the portion of that territory which became the United States, in common with that which still lay under the dominion of England. In other words, it was denied that the separation of a new state from an old one involves the loss, on the part of the inhabitants of the territory of the new state, of local rights of property within the territory remaining to the old state. On the contrary, the right to a common enjoyment by the two states, after

of the general debt of the state ceding territory. The case of Belgium, which took over a portion of the Netherlands debt, is scarcely in point. The treaty of 1839 (De Martens, Nouv. Rec. xvi. 782), by which the division of the debt was effected, was part of a general settlement of the countries in question, made at the dictation of Europe with the view of dealing with all the interests concerned in the most equitable and advantageous manner, and not with the bare object of enforcing law. The true rule is recognised by Halleck (i. 76), who distinguishes the case of a state which is so split up as to lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says, 'no more affects its rights and duties, than a change in its internal organisation, or in the person of its rulers. This doctrine applies to debts due to, as well as from, the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.'

separation, of property, irrespectively of its local position, which had previously been enjoyed in common by the subjects of the original state, was expressly asserted. By England, on the other hand, it was as distinctly maintained 'that the claim of an independent state to occupy and use at its discretion any part of the territory of another without compensation or corresponding indulgence, cannot rest on any other foundation than conventional stipulation[1].' The controversy was put an end to by a treaty in 1818, in which the indefensible American pretension was abandoned, and fishery rights were accepted by the United States as having been acquired by contract[2].

Of the Mosquito protectorate.

A like collision of opinion incidentally occurred in 1854 during the disputes between England and the United States with reference to the protectorate exercised by the former power over the Mosquito shore. It was at issue whether a protectorate exercised during part of the eighteenth century could be re-established after the separation of Nicaragua from Spain, or whether Nicaragua inherited certain rights stipulated for in treaties with Spain. In illustration of the arguments of the United States reference was made to a treaty between Great Britain and Mexico, and it was urged generally that 'it would be a work of supererogation to attempt to prove, at this period of the world's history, that these provinces having, by a successful revolution, become independent states, succeeded within their respective limits to all the territorial rights of Spain.' Lord Clarendon on his part replied that the clause in the treaty with Mexico stipulating that British subjects shall not be disturbed in the 'enjoyment and exercise of the rights, privileges, and immunities' previously enjoyed within certain limits laid down in a convention with Spain of the year 1786, which had been

[1] British and Foreign State Papers, vii. 79–97.

[2] This was frankly admitted by Mr. Dana, as agent for the United States, before the Halifax Fishery Commission in 1878. 'The meaning of the treaty,' he said, is 'that having claimed "the right of fishing" as a right inherent in us, we no longer claimed it as a right which cannot be taken away from us but at the point of the bayonet.' Parl. Papers, North America, No. 1, 1878, p. 183.

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referred to by Mr. Buchanan as proving the adhesion of Great Britain to the above principle, proves on the contrary that 'Mexico was not considered as inheriting the obligations or rights of Spain,' as otherwise a special stipulation would not be necessary[1]. The contention of Lord Clarendon was evidently well founded. Mr. Buchanan's general statement was accurate; but the very fact that Mexico succeeded to all the territorial rights of Spain, and consequently to full sovereignty within the territory of the Republic, shows that it could not be burdened by limitations on sovereignty to which Spain had chosen to consent. It possessed all the rights appertaining to an independent state, disencumbered from personal contracts entered into by the state from which it had severed itself.

Rights of the parent and the new state respectively in cases of disputed boundary.

A war which results in the formation of a new state may be terminated either with or without a treaty of partition and boundary. In the latter case the territory of the newly erected state community is defined by the space which it actually possesses and administers. In the former case the limits indicated by the treaty, if distinctly laid down, become of course the indisputable frontiers. Sometimes however the treaty is indeterminate, either from faults of expression or from imperfect knowledge, on the part of the negotiators, of the country through which the line of demarcation is run; disputes thus arise as to the ownership of portions of territory; and it becomes a question which, or whether either, of the two shall occupy and administer the disputed lands until their respective rights shall have been ascertained or some arrangement shall have been come to. When in such cases one of the parties is in actual possession at the date of the conclusion of the treaty it must be allowed so far to exercise sovereignty within the territory as is requisite for the due government of the latter, the two states being in the same position relatively to one another, to the extent that the meaning of the treaty is doubtful, as if no treaty existed. When, on the other hand, neither party is in actual possession at

[1] De Martens, Nouv. Rec. Gén. ii. 210–6.

the date of the conclusion of the treaty, no rights of sovereignty can be exercised by one of the two except with the consent of the other. A treaty of partition and boundary made between a mother country and a seceding part operates, not as a treaty of cession, but as an acknowledgment that certain territory is in fact in the possession of the state which has succeeded in establishing itself. Were it otherwise, the absurdity would present itself that a new state community would have no title to its territory until a treaty of partition and boundary was made, notwithstanding that the conclusion of a treaty with it involves a previous acknowledgment that it is a state, and consequently that it is already in legal possession of its territory. Hence disputed territory is not attributed to the mother country up to the moment at which it is shown to have been conveyed to the seceded state; the two states have equal rights as thoroughly as if they were of independent origin.

The Maine boundary.

Much of the above doctrine came under discussion during the Maine boundary dispute between England and the United States. At the peace of 1783 the limits of Maine were inadequately fixed, and a considerable tract of country was claimed under the terms of the treaty by both the signatory powers. Part of this may have been settled before 1783, part remained unoccupied in 1827 when the discussion in question arose, and part was settled at different times from 1790 onwards. It was admitted by the American government that Great Britain had a right to a 'de facto jurisdiction' over territory, if any such existed, which was inhabited before 1783; and the English government refrained, though evidently as a matter of concession and not of duty, from exercising proprietary or sovereign rights within the unoccupied territory; the discussion consequently turned only on the proper mode of dealing with the portion settled later than 1790. It was argued by Lord Aberdeen that before the independence of the United States the country in dispute was under British sovereignty as well as the adjoining province, to which by the contention of England it was attached;

and that as the claim of the United States rested on a cession followed by no actual delivery, the national character of the territory could not have undergone any change since a period antecedent to the treaty of 1783. 'It is consistent,' he added, 'with an acknowledged rule of law that when a doubt' as to the right of sovereignty 'exists, the party who has once clearly had a right and who has retained actual possession shall continue to hold it until the question at issue may be decided.' On behalf of the United States it was denied that the title to such territory as might be found to have been indicated by the treaty of 1783 was given by that treaty; the treaty confirmed but did not create; the title of the United States was pre-existent and, it was alleged, was based upon anterior rights possessed 'by that portion of His Majesty's subjects which had established itself' in the country comprised within the territory of the United States[1]. The latter part of the American position was untenable; but it was unnecessary; and the United States were certainly justified in their general contention that territory which was only constructively in possession of England before the treaty of 1783 could not be brought under its actual sovereignty so long as the validity of its title was in litigation.

Effects of cession upon the rights, &c. of the state ceding,

When part of a state is separated from it by way of cession, the state itself is in the same position with respect to rights, obligations, and property as in the case of acquisition of independence by the separated portion[2].

[1] British and Foreign State Papers, 1827–8, 490–585.

[2] There are one or two instances in which a conquering state has taken over a part of the general debt of the state from which it has seized territory. Thus in 1866 the debt of Denmark was divided between that country and Slesvig-Holstein (De Martens, Nouv. Rec. Gén. xvii. ii. 477); and in the same year Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated. Lawrence, Commentaires sur les Éléments, &c. de Wheaton, i. 214. It may be doubted whether any other like cases have occurred. [After the war of 1898 the United States refused to assume any part of the Cuban debt or give up the Government Funds in the Cuban State Banks.]

Fiore (§ 351 and note) and other writers confuse local with general debt,

To a certain extent also the situation of the separated part is identical with that which it would possess in the case of independence. It carries over to the state which it enters the local obligations by which it would under such circumstances have been bound, and the local rights and property which it would have enjoyed. In other respects it is differently placed. In becoming incorporated with the state to which it is ceded it acquires a share in all the rights which the former has as a state person, and it is bound by the parallel obligations. Thus, for instance, the provisions of treaties between a state and foreign powers, including among the latter the state which has ceded territory acquired by the former, are extended to provinces obtained by cession.

and the state acquiring territory.

When a state ceases to exist by absorption in another state, the latter in the same way is the inheritor of all local rights, obligations, and property; and in the same way also the provisions of treaties which it has concluded are extended to affect the annexed territory. Thus after the incorporation of Naples in the kingdom of Italy it was decided by the Courts both of Italy and France that a treaty of 1760 between France and Sardinia relative to the execution of judgments of the tribunals of the one power within the territory of the other was applicable to the whole Italian state. There is this difference however between the effect of acquisition by cession and by absorption of an entire state, that in the latter case, the annexing power being heir to the whole property of the incorporated state, it is liable for the whole debts of the latter, and not merely for those contracted for local objects or secured upon special revenues; unless indeed it is considered that local debt and general debt are only different words for the same thing when a state loses its separate existence and is taken bodily in to form a member of another state.

Effects of absorption of a state.

and elevate into a legal rule the admitted moral propriety of taking over, under treaty, the general debt in the proportion of the value of the territory acquired.

CHAPTER II

TERRITORIAL PROPERTY OF A STATE

In what the territorial property of a state consists.

The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water.

Modes of acquiring it.

A state may acquire territory through a unilateral act of its own by occupation, by cession consequent upon contract with another state or with a community or single owner, by gift, by prescription through the operation of time, or by accretion through the operation of nature.

Occupation.

When a state does some act with reference to territory unappropriated by a civilised or semi-civilised state, which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right is gained as against other states, which are bound to recognise the intention to acquire property, accompanied by the fact of possession, as a sufficient ground of proprietary right. The title which is thus obtained, and which is called title by occupation, being based solely upon the fact of appropriation, would in strictness come into existence with the commencement of effective control, and would last only while it continued, unless the territory occupied had been so long held that title by occupation had become merged in title by prescription. Hence occupation in its perfect form would suppose an act equivalent to a declaration that a particular territory had been seized as property, and a

subsequent continuous use of it either by residence or by taking from it its natural products.

States have not however been content to assert a right of property over territory actually occupied at a given moment, and consequently to extend their dominion *pari passu* with the settlement of unappropriated lands. The earth-hunger of colonising nations has not been so readily satisfied; and it would besides be often inconvenient and sometimes fatal to the growth or perilous to the safety of a colony to confine the property of an occupying state within these narrow limits. Hence it has been common, with a view to future effective appropriation, to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continued enjoyment or control; and it has become the practice in making settlements upon continents or large islands to regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land[1].

Effect of discovery and appropriation without settlement.

In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate. Thus when an unoccupied country is formally annexed an inchoate title is acquired, whether it has or has not been discovered by the state annexing it; but when the formal act of taking possession is not shortly succeeded by further acts of ownership, the claim of a discoverer to exclude other states is looked upon with more respect than that of a mere appropriator, and when discovery

[1] Some writers (e.g. Klüber, § 126; Ortolan, Domaine International, 45-7; Bluntschli, §§ 278, 281) refuse to acknowledge that title can be acquired without continuous occupation, but their doctrine is independent of the facts of universal practice.

has been made by persons competent to act as agents of a state for the purpose of annexation, it will be presumed that they have used their powers, so that in an indirect manner discovery may be alone enough to set up an inchoate title.

How an inchoate title so acquired may be kept alive.

An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition.

Occupation must be a state act.

In order that occupation shall be legally effected it is necessary, either that the person or persons appropriating territory shall be furnished with a general or specific authority to take possession of unappropriated lands on behalf of the state, or

else that the occupation shall subsequently be ratified by the state. In the latter case it would seem that something more than the mere act of taking possession must be done in the first instance by the unauthorised occupants. If, for example, colonists establishing themselves in an unappropriated country declare it to belong to the state of which they are members, a simple adoption of their act by the state is enough to complete its title, because by such adoption the fact of possession and the assertion of intention to possess, upon which the right of property by occupation is grounded, are brought fully together. But if an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which, being neither declared upon the spot nor supported by local acts, is of no legal value. A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention; where land is occupied by unauthorised colonists, ratification, as has been seen, is able permanently to unite the two; but the act of the uncommissioned navigator is not a state act at the moment of performance, and not being permanent in its local effects it cannot be made one afterwards, so that the two conditions of the existence of property by occupation, the presence of both of which is necessary in some degree, can never co-exist[1].

[1] On the conditions of effective occupation, see Vattel, liv. i. ch. xviii. §§ 207, 208; De Martens, Précis, § 37; Phillimore, i. §§ ccxxvi–viii; Twiss, i. §§ 111, 114, 120; Twiss, The Oregon Question, 165 and 334; Bluntschli, §§ 278–9; and especially the documents containing the arguments used internationally in the controversies mentioned below.

Obviously the acts of a mercantile company, such, e. g. as the East African Company, acting under a charter enabling it to form establishments and exercise jurisdiction in an uncivilised country are to be classed in point of competence with those of commissioned agents of the state.

It must depend upon circumstances whether the effect of such acts is to set up full rights of property and sovereignty, or only those which are involved in a protectorate.

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Area affected by an act of occupation.

There is no difference of opinion as to the general rule under which the area affected by an act of occupation should be determined. A settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them. When an island of moderate size is in question it is not difficult to see that this rule involves the attribution of property over the whole to a state taking possession of any one part. But its application to continents or large islands is less readily made. Settlements are usually first established upon the coast, and behind them stretch long spaces of unoccupied country, from access to which other nations may be cut off by the appropriation of the shore lands, and which, with reference to a population creeping inwards from the sea must be looked upon as more or less attendant upon the coast. What then in this case is involved in the occupation of a given portion of shore? It may be regarded as a settled usage that the interior limit shall not extend further than the crest of the watershed[1]; but the lateral frontiers are less certain. It has been generally admitted that occupation of the coast carries with it a right to the whole territory drained by the rivers which empty their waters within

[1] A right of indefinite interior extension is sometimes said to have been asserted by the different nations who colonised North America. According to Mr. Calhoun they 'claimed for their settlements usually specific limits along the coast, and generally a region of corresponding width extending across the entire continent to the Pacific Ocean,' and England is alleged to have maintained the pretension against France before the Peace of 1763. Mr. Calhoun's allegation was however made, as was a like statement by Mr. Gallatin, in order to fortify the claim of the United States to the country west of the Rocky Mountains; the original papers connected with the negotiations of 1761–2, in so far as they are printed in Jenkinson's Treaties (vol. iii), give no indication that any such claim as that mentioned was made by England; and Sir Travers Twiss (The Oregon Question, 249) says that 'it does not appear that any conflicting principles of international law were advanced by the two parties.' I am not aware that any other dispute had occurred in the course of which the principle could have been affirmed. Probably therefore the statement has no better ground than the fact that English colonial grants were made without interior limits—a fact which by itself is of no international value.

its line; but the admission of this right is perhaps accompanied by the tacit reservation that the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possession. It has been maintained, but it can hardly be conceded, that the whole of a large river basin is so attendant upon the land in the immediate neighbourhood of its outlet that property in it is acquired by merely holding a fort or settlement at the mouth of the river without also holding lands to any distance on either side. Again, it is not considered that occupation of one bank of a river necessarily confers a right to the opposite bank, still less to extensive territory beyond it, so that if a state appropriates up to a river and stops there, its presence will not debar other states from occupying that portion of the basin which lies on the further side; nor even, though there is a presumption against them, will they be debarred as of course from occupying the opposite shore. When two states have settlements on the same coast, and the extent along it of their respective territories is uncertain, it seems to be agreed that the proper line of demarcation is midway between the last posts on either side, irrespectively of the natural features of the country [1].

Necessary adaptation of the old rule to modern circumstances.

Restrictive custom goes no further than this; but in the circumstances of the present day, it is plain that custom is not needed to uphold a further limitation in the right of appropriating territory as attendant upon a settlement. During the older days of colonial occupation, in countries where questions of boundary arose, waterways were not merely the most convenient, they were the necessary, means of penetrating into the interior. It was reasonable therefore that the power which could deny access to them should, as a general rule, have preferential rights over the lands which they traversed. But in Africa, which is the only portion of the earth's surface where this part of the law of occupation still finds room to assert itself, large tracts of country can be more easily reached over land, especially by

[1] Phillimore, i. §§ ccxxxii–viii; Twiss, i. §§ 115–9, 124; and The Oregon Question, 249.

means of railways, than along the river courses, and the great river basins are so arranged that a final division of the continent could hardly be made in accordance with their boundaries. When the third edition of this work was passing through the press in the end of 1889, it already seemed safe to point out as a certainty 'that the tide of commerce, carrying with it trading posts, belonging here to one nation and there to another, and probably even a tide of European settlement, will have swept over vast spaces of the interior by roads independent of states holding the nearest coasts, or mouths of river basins, long before these states have been able to extend their jurisdiction over the territory thus brought under European influence or control. There is no probability that the interests of trade and colonisation will be subordinated to a pedantic adherence to the letter of the ancient rule.' The forecast of 1889 was not long in becoming an accomplished fact. Many of the recent appropriations have been carried out in the anticipated manner; and if the little which remains to be seized is divided in conformity with the outlines of river basins, it will rather be because those basins happen to lend themselves to effective occupation by a given power, than from respect to a principle of law.

Illustrations of the foregoing doctrines.

The manner in which the foregoing doctrines have been used in international controversies may be illustrated by the following examples.

Texas.

After the cession of Louisiana to the United States by France in 1803 a dispute arose between the former power and Spain as to the boundaries of the ceded territory, which according to the United States extended in a westerly direction to the Rio Grande, and in the opinion of Spain reached only to a line drawn between the Red River and the Sabine. The facts of the case were as follows. Between the years 1518 and 1561 the northern shores of the Gulf of Mexico were gradually explored by Spanish officers, but no settlements were made upon them, and they were very imperfectly known, when in 1681–2 a French officer named La Salle succeeded in descending the Ohio

and the Mississippi to the ocean, and took formal possession of the country at the mouth of the latter river in the name of his sovereign. On his return it was determined to make a permanent settlement, and in 1685 he was sent out in command of an expedition for the purpose. Being unable to find the entrance to the Mississippi he coasted along to the Bay of Espiritu Santo [1], about four hundred miles further to the west, where a fort was erected, and held until the garrison was massacred by the Indians in 1689. In the course of the next year the Spaniards appeared in the Bay and founded a settlement, which remained from that time in continuous existence. Gradually, scattered posts were pushed eastwards and northwards into Texas. The French on their part did nothing further until 1712, when Louis XIV, relying on the acts of discovery and appropriation which had been done by La Salle, granted to Anthony Crozat, by letters patent, the exclusive commerce of the territory which was claimed by the French Crown in virtue of those acts, declaring it to comprehend 'all the lands, coasts, and islands which are situated in the Gulf of Mexico, between Carolina on the east and Old and New Mexico on the west, with all the streams which empty into the ocean within those limits, and the interior country dependent on the same.' A settlement was then made near the site of New Orleans, and outlying posts were established, none of which however seem to have been placed in a westerly direction at a more advanced point than Natchitoches on the Red River. To watch the post which existed there a Spanish fort was established in 1714 at a distance of only seven leagues, and it was kept garrisoned until Louisiana came into the hands of Spain [2], when, being no longer required, it was abandoned. No colonisation appears to have taken place to the east of the Rio Colorado, but a line of settlements, of which some were of considerable size, was formed between the Bay of Espiritu Santo and the Province of Sonora. The United States, as assignees of

[1] Called the Bay of St. Bernard by La Salle.

[2] Louisiana was ceded to Spain in 1762, and re-ceded to France in 1800.

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the French title, claimed to possess the basin of the Mississippi by right of discovery and of settlement at its mouth, and the province of Texas in virtue of occupation of the coast, which, it was asserted, had been definitively appropriated by the acts of La Salle at the mouth of the Mississippi and at the Bay of Espiritu Santo, and to which a title had been kept alive by the subsequent establishment of the French posts upon the river. It was further argued that as the French title became definitive in 1685 the boundary should run along the Rio Grande, that river being half-way between Espiritu Santo and the then nearest Spanish settlement, which, it was argued, lay in the Province of Panuco. All acts, it was alleged, which had been done by the Spaniards east of the Rio Grande were acts of usurpation, and consequently incapable of giving title. The claim of the United States to the basin of the Mississippi was not seriously contested, but with respect to Texas it was urged that the discoveries of Spanish navigators had put Spain in possession of its coasts before the French landed in the Bay of Espiritu Santo, that the lodgment effected there by the latter was merely temporary, and that the long-continued and uninterrupted subsequent possession of the whole country by Spain was a better root of title than a prior unsuccessful attempt to establish herself on the part of France. It was therefore demanded that the frontier between the two states should be fixed half-way between the posts which had been permanently occupied by the French and the Spaniards respectively. Ultimately the boundary was settled very nearly along the line suggested by Spain, as part of a general scheme of boundary settlement, under which that country made sacrifices elsewhere[1].

Oregon Territory.

Another controversy of considerable interest is that which arose between England and the United States with reference to the Oregon Territory. In this case the negotiations passed through two distinct phases, during the earlier of which the

[1] British and Foreign State Papers, 1817–18.

United States claimed the river basin of the Columbia, while during the latter they claimed in addition the whole country northwards to the parallel of 50° 40′. The original claim rested upon discovery and settlement. In 1792 an American trader named Gray discovered the mouth of the river Columbia, and sailed up twelve or fifteen miles, until the channel by which he entered ceased to be navigable. Some years before, Heçeta, a Spanish navigator, in passing across the entrance had observed a strong outflow, and had come to the conclusion that a river debouched at the spot. A few weeks before Gray entered it, Captain Vancouver, who was engaged in surveying the coast for the English government, had noticed the existence of a river, but thought it too small for his vessels to go into. On hearing of Gray's success in entering he returned, and an officer under his command, after finding the true channel, explored the river for a hundred miles, and formally took possession of the country in the King's name. Gray was uncommissioned; he made no attempt to take possession of the country on behalf of the United States, and his discovery, which was only known to his government through Captain Vancouver's account, was not followed up by any act which could give it a national value. In 1811 a trading company of New York established near the mouth of the river a commercial post, which in 1813 was sold to the English North-West Company[1]. Upon these facts it was argued by the American negotiators that Gray effected a discovery, the completeness of which was not diminished by anything which occurred before or after; that his predecessors had failed to ascertain the existence of a great river, and that the subsequent English exploration was simply a mechanical extension of what had been essentially done by him; that his discovery vested the basin of the Columbia in the United States; and that, the land having thus become national property, the

[1] Some explorations made by both English and Americans of the various head waters of the Columbia may be allowed to balance one another. They were of little importance from a legal point of view.

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establishment of a trading post formed a substantive act of possession on their part. The English negotiators on the other hand, besides putting forward a claim by discovery to the whole coast as against the United States, maintained that the discovery of the river was a progressive one, and objected that, even were it not so, the acts of an uncommissioned discoverer, if taken alone, are incapable of giving title, and that the discovery was not supported by national acts. In such circumstances the establishment of a trading post ceased to be of importance.

The negotiations entered upon their second phase after the conclusion of a boundary treaty between the United States and Spain in 1819, by which the former power acquired by cession whatever rights were possessed by the latter to country north of the forty-second parallel. From the point of view of the law of occupation this is of minor interest, because the force of the respective claims depended upon the relative value of two sets of acts of discovery purporting to be of identical character. The question at issue was rather one of fact than of law. It was alleged by the United States that Spain, until it ceded its rights, had possessed a title to the whole coast through discoveries gradually perfected during two centuries[1], and by occupation at various points: while on the part of England it was contended that the real discovery of the coast had been effected by Sir Francis Drake in 1579, by Captain Cook in 1778, and during the systematic survey of Vancouver in 1792–4, and that the two latter officers had taken actual possession. It need only be remarked that the later contention of the United States was inconsistent with its original claim. To affirm the Spanish title was to proclaim the nullity of the title said to have been conferred by the discoveries of Gray. If the title through Gray was good, the coast up to the fifty-fourth parallel did not

[1] There is great reason to doubt whether some of the Spanish navigators who are alleged to have made discoveries along the north-west coast of America ever existed, and it is certain that the accounts supplied by others are untruthful. See Twiss's Oregon Question, chap. iv.

belong to Spain; if it did belong to Spain, Gray's discovery was evidently worthless[1].

The Venezuela Hinterland.

[Since the last edition of this book an important case involving the question of discovery and effective occupation has been submitted to a Court of International Arbitration. Territory comprising 60,000 square miles to the south of the Orinoco and west of the Essequibo rivers had for upwards of fifty years been a bone of contention between Great Britain and the Republic of Venezuela. The latter power claimed as the inheritor of the Spanish monarchy, from which it had revolted in 1810; while Great Britain, to whom British Guiana was transferred by Holland in 1814, had succeeded to all the rights of the Dutch. The boundaries of the territory thus acquired had never been delimited until 1841, when the British Government employed a Prussian engineer, Sir Robert Schomburgk, for that purpose. The 'Schomburgk line' was the consequence, extending westward and southward from the entry of the Barima river into the Orinoco, along the banks of the Amocura, Cuyuni, Cotinga, and Takutu rivers, and following their course down to the basin of the Essequibo and the northern frontier of Brazil. It was based on an examination of the historical evidence as to occupation, and of the extent to which the Indian population had been effected by Dutch influence, together with a consideration of the natural features existing on the edge of the disputed territory. Venezuela, alarmed at the prospect of losing control over the mouth of the Orinoco, revived the Spanish claim to the whole territory

[1] Parl. Papers, lii. 1846, Oregon Correspondence. In the latter part of the discussion the English government relied also upon the Convention of the Escorial, usually called the Nootka Sound Convention, by which it maintained that Spain had made an acknowledgment of the existence of a joint right of occupancy on the part of England in those portions of North-West America which were not already occupied. The United States contested the accuracy of the construction placed upon the Convention by England. As the dispute so far as it turned upon this point has no bearing upon the law of occupation, it is unnecessary to go into it. For the facts of the case in its later aspects and for the English and American views, see De Garden, Histoire des Traités de Paix, v. 95; Parl. Papers, lii. 1846, Oregon Corresp. 34 and 39; Twiss, Oregon Question, 379. For the Convention, see De Martens, Rec. iv. 493.

of Guiana so far as it had not been directly ceded to Holland by treaty.

The controversy was allowed to drag on till the sudden intervention of the United States in December 1895, on the plea that the Monroe doctrine was involved, brought matters to a crisis. In 1897 a treaty of arbitration was concluded between Great Britain and Venezuela, but the United States assumed the conduct of the case on behalf of the latter, choosing her counsel and arbitrators from their own Bar and Bench exclusively.

It was urged before the Arbitration Court, on behalf of the prior claim of Spain, that Columbus was alleged to have sighted the mainland off the mouths of the Orinoco in 1498, and that in 1591 Antonio de Berrio, in his quest for the fabled El Dorado, had certainly sailed down that river from west to east, founding Santo Thomé on his way: from this date it was contended that the whole of Guiana—which, owing to the intercommunication of tributaries of the Amazon and Orinoco, was treated by the early explorer as an island—had been incorporated in the Spanish Empire. It could not be shown that during the 17th century any Spaniard had set foot within the territory claimed for Venezuela, but between 1724 and 1750 a certain number of Capuchin Mission stations had been founded to the north-west of the Cuyuni river, from which occasional raiding expeditions were made against the Dutch and the Indians, while it was admitted that Spanish traders had journeyed down the Cuyuni and along the waterways within the coast line. The Spanish title thus rested on the original discovery of Guiana, perfected by the intention to occupy the whole, and actual occupation of a part of the country discovered. Of effective or permanent occupation to the east of Schomburgk's line no instance could be made out.

On the other hand it was alleged that the Dutch since the end of the 16th century had maintained their right to trade to the coast of Guiana between the Orinoco and the Amazon, occupying the coast from the Corentin to the Orinoco, and exercising control on all the rivers flowing into the Atlantic from the Corentin to the

Amakuru. As early as 1623 they began to establish settlements between the Corentin and the Orinoco, which were formally confirmed to them by the Treaty of Munster. From that time down to the cession of British Guiana to Great Britain the Dutch had continually extended their settlements into the interior. They exercised a protectorate over the Caribs and other warlike Indian tribes, while their trade, under the direction of the West India Company, was pushed to the banks of the Cuyuni and to the Orinoco east of Santo Thomé. On these facts Great Britain claimed that the whole of the disputed territory had been in law and in fact for more than 200 years in the occupation and under the control of the Dutch and the British.

The decision of the Court, published on the 3rd of October 1899, was favourable to Great Britain, and the bulk of the disputed territory was declared to belong to British Guiana. At two points, however, 'Schomburgk's line' was varied: Barima Point and the actual mouth of the Barima River were given to Venezuela, and a deviation was made in favour of the same country by which the boundary line, after reaching the Cuyuni, was made to stop short before running to the head of that river and turned down the Wenamu.

The Court, which was unanimous, did not assign the grounds of its award, and it is unknown what were the exact conclusions of fact on which it was based. Speaking generally, Great Britain secured the territory over which Dutch influence and commerce had extended, though a line was drawn across the Barima in order to ensure to Venezuela the south shore of the Orinoco to its mouth.]

Recent tendency to change in the law of occupation.

It will have been observed in these cases, and it will be found in most of the older cases in which title rests upon occupation, that the acts relied upon as giving title, previously to the actual plantation of a colony, have been scattered at somewhat wide intervals over a long space of time. Until recently this has been natural, and indeed inevitable. When voyages of discovery extended over years, when the coasts and archipelagos lying open

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to occupation seemed inexhaustible in their vastness, when states knew little of what their own agents or the agents of other countries might be doing, and when communication with established posts was rare and slow, isolated and imperfect acts were properly held to have meaning and value. When therefore it first became worth while to question rights to a given area, or to dispute over its boundaries, the tests of effective occupation were necessarily lax. But of late years a marked change has occurred. Except in some parts of the interior of Africa, there are few patches of the earth's surface the ownership of which can be placed in doubt. With the restriction of the area of possible occupation the desire to secure what remains has become keener. At the same time the difficulties which often stood in the way of continuity of occupation have vanished before improved means of communication. A tendency has consequently declared itself to exact that more solid grounds of title shall be shown than used to be accepted as sufficient.

Declaration adopted at the Berlin Conference.

The most notable evidence of this tendency is afforded by the declaration adopted at the Berlin Conference of 1885. By that declaration Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey, and the United States agreed that 'any power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification[1] thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own,' and that 'the Signatory Powers of the present Act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Con-

[1] At least eleven notifications, dealing in eight cases with new acquisitions, and in the remaining three cases with delimitations of territory or of spheres of influence, have been made in accordance with this provision.

tinent sufficient to protect existing rights, and as the case may be, freedom of trade and transit under the conditions agreed upon[1].' In other words, while ancient grounds of title are left to be dealt with under the old customary law, old claims of title if not fully established under that law, and new titles, whether acquired by occupation of unclaimed territory, or through the inability of another state to justify a competing claim, must for the future be supported by substantial and continuous acts of jurisdiction. The declaration, it is true, affects only the coasts of the Continent of Africa; and the representatives of France and Russia were careful to make formal reservations directing attention to this fact; the former, especially, placing it on record that the island of Madagascar was excluded. Nevertheless an agreement, made between all the states which are likely to endeavour to occupy territory, and covering much the largest spaces of coast which, at the date of the declaration, remained unoccupied in the world, cannot but have great influence upon the development of a generally binding rule[2].

It is to be noted that as the declaration applies only to the coasts of Africa, all questions arising out of interior extensions have to be decided, even as regards that continent, by the help of the customary law. Elsewhere that law naturally remains for the present in full force[3].

[1] General Act of the Berlin Conference, Arts. 34, 35. Parl. Papers, Africa, No. 4, 1885.

[2] France on taking possession of the Comino Islands, and England with regard to Bechuana Land, have already made notifications which were not obligatory under the Berlin Declaration. These notifications were however evidently made from motives of convenience and not with a view of establishing a principle; France having placed upon record the reservations mentioned above, and England not having notified, at a later date, her assumption of a protectorate over the Island of Socotra.

[3] Holtzendorff (1887, Handbuch, ii. § 55) is at least premature in saying that 'Der grundsätzlich entscheidende Gesichtspunkt ist dieser: kein Staat kann durch einen Occupationsact mehr Gebiet ergreifen, als er mit seinen effectiven Herrschaftsmitteln an Ort und Stelle ständig in Friedenszeiten zu regieren vermag.' The strict application of this principle would deprive Germany of the larger part of the territory which she claims in South-Western Africa and New Guinea. Prince Bismarck's conception of the customary law is shown by an expression of wish uttered by him at the

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Abandonment of territory acquired by occupation.

When an occupied territory is definitively abandoned, either voluntarily or in consequence of expulsion by savages or by a power which does not attempt to set up a title for itself by conquest, the right to its possession is lost, and it remains open to occupation by other states than that which originally occupied it. But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by inscriptions, which would be insufficient to confirm the mere act of taking possession; and even where the abandonment is complete, an intention to return must be presumed during a reasonable time. If it has been involuntary, the question whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon and following the withdrawal suggest the intention, or give grounds for reasonable hope, of return. Where intention in this case is relied upon, it is evident that, as abandonment was caused by the superior strength of others who might interfere with return, a stronger proof of effective intention must be afforded than on an occasion of voluntary abandonment, and that the effect of a mere claim, based upon the former possession, if valid at all, will soon cease.

Case of Santa Lucia;

In 1639 Santa Lucia was occupied by an English colony, which was massacred by the Caribs in the course of 1640. No attempt was made to recolonise the island during the following ten years. In 1650 consequently the French took possession of

opening of the Berlin Conference. 'Pour qu'une occupation soit considérée comme effective, il est à désirer que l'acquéreur manifeste, dans un délai raisonnable, par des institutions positives, la volonté et le pouvoir d'y exercer ses droits et de remplir les devoirs qui en résultent' (Parl. Papers, Africa, No. 4, 1885, p. 3). What M. Holtzendorff lays down as the existing law is to him an object of aspiration.

Since the signature of the Berlin Declaration the governments of Great Britain and Germany by a Convention of the 5th March, 1885 (Parl. Papers, Spain, No. 1, 1885), have expressly recognised the sovereignty of Spain 'over the places effectively occupied, as well as over those places not yet occupied, of the Archipelago of Sulu.'

it as unappropriated territory. In 1664 they were attacked by Lord Willoughby and driven into the mountains, where they remained until he retired three years later, when they came down and reoccupied their lands. Whether they died out does not appear, though probably this was the case, for at the Treaty of Utrecht Santa Lucia was viewed as a 'neutral island' in the possession of the Caribs. The French however seem to have considered their honour as being involved in the ultimate establishment of their claim. During the negotiations which led to the peace of 1763 they attached importance to the acquisition of the island, and by the terms of that peace it was ultimately assigned to them. There can be little doubt, considering the shortness of the time during which the English colony had existed, and the length of the period during which no attempt was made to re-establish it, that the French were justified in supposing England to have acquiesced in the results of the massacre, and that their occupation consequently was good in law[1].

of Delagoa Bay.

A somewhat recent controversy to which title by occupation has given rise turned mainly upon the effect of a temporary cessation of the authority of the occupying state. From 1823 to 1875, when the matter was settled by arbitration, a dispute existed between England and Portugal as to some territory at Delagoa Bay, which was claimed by the former under a cession by native chiefs in the first-mentioned year, and by the latter on the grounds, amongst others, of continuous occupation. It was admitted that Portuguese territory reached to the northern bank of the Rio de Espiritu Santo or English River, which flows into the bay, and that a port and village had long been established there. The question was whether the sovereignty of Portugal extended south of the river, or whether the lands on that side had remained in the possession of their original owners. England relied upon the facts that the natives professed to be independent in 1823, that they acted as such, and that the commandant of the fort repudiated the possession of authority over them. In

[1] Jenkinson's Treaties, iii. 118, 157, 170.

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the memorials which were submitted on behalf of Portugal, amidst much which had no special reference to the territory in dispute, there was enough to show that posts had been maintained within it from time to time, and that authority had probably been exercised intermittently over the natives. The area of the territory being small, and all of it being within easy reach of a force in possession of the Portuguese settlement, there could be little difficulty in keeping up sufficient control to prevent a title by occupation from dying out. There was therefore a presumption in favour of the Portuguese claim. The French government, which acted as arbitrator, took the view that the interruption of occupation, which undoubtedly took place in 1823, was not sufficient to oust a title supported by occasional acts of sovereignty done through nearly three centuries, and adjudged the territory in question to Portugal[1].

Cession.

Cessions of territory, whether by way of sale or exchange, and gifts, whether made by testament or during the lifetime of the donor, call for no special remark, the alienation effected by their means being within the general scope of the powers of alienation which have been already mentioned as belonging to a state[2], and the questions of competence on the part of the individuals contracting or giving which may arise being matters which, in so far as they belong to international law and not to the public law of the particular state, will find their proper place in a later chapter[3].

Prescription.

Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so. The principle upon which it rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application

[1] Parl. Papers, xlii. 1875.

[2] Antea, p. 45.

[3] Instances of alienation by sale, exchange, gift, and will, may be found in Phillimore, i. §§ cclxviii–lxx, and cclxxv; and in Calvo, §§ 225–8.

to beings for whose disputes no tribunals are open, some modifications are necessarily introduced. Instead of being directed to guard the interests of persons believing themselves to be lawful owners, though unable to prove their title, or of persons purchasing in good faith from others not in fact in legal possession, the object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right. In both cases the admission of a proprietary right grounded upon the mere efflux of time is intended to give security to property and to diminish litigation, but while under the conditions of civil life it is possible so to regulate its operation as to render it the handmaid of justice, it must be frankly recognised that internationally it is allowed, for the sake of interests which have hitherto been looked upon as supreme, to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment, but to establish itself permanently and solidly. Internationally therefore prescription must be understood not only to confer rights when, as is the case with several European countries, the original title of the community to the lands which form the territory of the state or its nucleus is too mixed or doubtful to be appealed to with certainty; or, as has sometimes occurred, when settlements have been made and enjoyed without interference within lands claimed, and perhaps originally claimed with right, by states other than that forming the settlement; but also to give title where an immoral act of appropriation, such as that of the partition of Poland, has been effected, so soon as it has become evident by lapse of time that the appropriation promises to be permanent, in the qualified sense which the word permanent can bear in international matters, and that other states acquiesce in the prospect of such permanence. It is not of course meant that a title so acquired is good as against any rights which the inhabitants of the appropriated country may have to free themselves from a foreign yoke, but merely that it

is good internationally, and that neither the state originally wronged nor other states deriving title from it have a right to attack the intruding state on the ground of deficient title, when once possession has been consolidated by time, whether the title was bad in its inception, or whether, having been founded on an obsolete or extinguished treaty, it has become open, in the absence of prescription, to question on the ground of the rights of nationality or of former possession [1].

[1] A denial of title by prescription has as yet been rarely formulated in international law, but there can be little doubt that the sense of its value has diminished of late years, mainly under the influence of the sentiment of nationality. In the acquiescence with which the annexation of Alsace and Lorraine to Germany in 1871 was in some cases received, and the mildness of the disapproval with which it was elsewhere met, it is impossible not to recognise the want of a due appreciation of the importance of prescription as a check upon unnecessary territorial disturbance. If the severance from France of Alsace and Lorraine had been looked upon as an instance of naked conquest, it is probable that European public opinion would have been gravely shocked by the measure. It is eminently doubtful whether respect for title by prescription, altogether apart from its tranquillising tendency, does not lead to better results than are likely to be offered by the views which are dominant at present in the popular mind throughout Europe. The principle of nationality is at any rate associated with a good deal of crude thought; it includes more than one distinctly retrogressive idea; it could not be logically applied without an amount of disturbance for which the mere enforcement of a principle would afford but poor compensation; and finally it is impossible to imagine that arrangements, so divorced from the practical needs of communities as those to which the doctrine of nationality would give rise, could contain any element of permanence. That there have been certain cases in which it was just and for the common good to give free scope to the principle is not even a sufficient justification for the prominence which it has been allowed to assume in politics; and it is nothing short of extraordinary that a doctrine which can so little bear strict examination should be permitted to intrude into the domain of legal ideas so often as is the case.

The tendency to import the political notion of nationality into law has been especially marked in Italy; and if the brilliant essay of Mamiani (D'un nuovo diritto Europeo) may be accounted for and excused by the epoch of its publication (1860), it was unfortunate that the work of Fiore (Nouveau Droit International) should continue after the unification of the country to perpetuate a doctrine as law, which ought to have been seen, when the eager feelings of the period of liberation had subsided, to have nothing to do with it. In his rewritten Trattato di Diritto Internazionale Pubblico (vol. i. 1879, §§ 267-97) M. Fiore has greatly modified his doctrine. He acknowledges that 'gli stati sono le persone giuridiche del diritto

Accretion by the operation of nature.

By the action of water new formations of land may come into existence in the neighbourhood of the territory occupied by a state, either in the open sea, or in waters lying between the territory of the state and that of a neighbour, or in actual contact with land already appropriated, or changes may take place in the course of rivers, by which channels are dried up, and appropriated land is covered with water. Out of such cases questions of proprietorship spring, to deal with which the provisions of Roman law, in this matter the simple embodiment of common sense, have been adopted into international law. When the frontier of a state is formed by a natural water boundary, and not by a line indicated by fixed marks which happen to coincide with the waters' edge, accretions received by the land from gradual fluvial deposit become the property of the state to the territory of which they attach themselves, even though when the deposits take place in the bed of a river, its course may in the lapse of time be so diverted that the land receiving accretion occupies part of the original emplacement of the neighbouring territory. If however the boundary is a fixed line, the results of accretion naturally fall to the owner of whatever lies on the further side of the line. When the bed of the river belongs equally to two states, islands formed wholly on one side of the centre of the deepest channel belong to the state owning the nearer shore; while those that form in mid-stream

internazionale, tuttochè ad essi non possa sempre essere attribuita la personalità legittima.'

Lampredi (Jur. Pub. Univ. Theorem. p. iii. cap. viii), De Martens (Précis, §§ 70–1), and Klüber (§ 6), deny the existence of prescription as between states, on the ground that prescription is not a principle of natural law, and that there being no fixed term for the creation of international title by it, it cannot be said to have been adopted into international positive law. Mamiani (p. 24) denies the existence of international prescription, because it cannot exist 'in faccia ai diritti essenziali ed irremovibili della persona umana,' but, as the words quoted may suggest, he is thinking only of the relations of a dominant state to a subject population.

For the views ordinarily held upon the subject, see e. g. Grotius (De Jure Belli et Pacis, lib. ii. c. iv); Wolff (Jus Gent. §§ 358–9); Vattel (liv. ii. ch. xi. §§ 147, 50); Wheaton (Elem. pt. ii. ch. iv. § 4); Riquelme (i. 28); Heffter (§ 12); Phillimore (i. §§ cclv–viii); Bluntschli (§ 290); Calvo (§ 212).

are divided by a line following the original centre of the channel. Analogously, islands formed in the sea out of the alluvium brought down by a river become, as they grow into existence, appendages of the state to which the coast belongs, so that though they may be beyond the distance from shore within which the sea is territorial, they cannot be occupied by foreign states, and even while still composed of mud and of insufficient consistency for any useful purpose, they are so fully part of the state territory that the waters around them become territorial to the same radius as if they were solid ground. On occasions of sudden change, as when a river breaks into a new course entirely within the territory of one of the riparian states, or when a lake, of which the bed belongs wholly to one state, overflows into low-lying lands belonging to another state and transforms them into a lagoon, no alteration of property takes place; and the boundary between the states is considered to lie in the one case along the old bed of the river, and in the other along the former edge of the lake[1].

Boundaries of state territory.

The boundaries of state territory may consist either in arbitrary lines drawn from one definite natural or artificial point to another, or they may be defined by such natural features of a country as rivers or ranges of hills. In the latter case more than one principle of demarcation is possible; certain general rules therefore have been accepted which provide for instances in which from the absence of express agreement or for other reasons there is doubt or ignorance as to the frontier which may justly be claimed. Where a boundary follows mountains or hills, the water-divide constitutes the frontier. Where it follows a river, and it is not proved that either of the riparian states possesses a good title to the whole bed, their territories are separated by

[1] Grotius, De Jure Belli et Pacis, lib. ii. c. iii. §§ 16, 17; Vattel, liv. i. ch. xxii. §§ 267–77; Phillimore, i. §§ ccxxxviii–ix; Halleck, i. 146; Calvo, § 294; Bluntschli, §§ 295–99. Mud islands at the mouth of the Mississippi, some of which seem to have been outside the three-mile limit, were held by Lord Stowell to be in the territory of the United States in the case of the Anna, v. Rob. 373.

a line running down the middle, except where the stream is navigable, in which case the centre of the deepest channel, or, as it is usually called, the Thalweg, is taken as the boundary. In lakes, there being no necessary track of navigation, the line of demarcation is drawn in the middle. When a state occupies the lands upon one side of a river or lake before those on the opposite bank have been appropriated by another power, it can establish property by occupation in the whole of the bordering waters, as its right to occupy is not limited by the rights of any other state; and as it must be supposed to wish to have all the advantages to be derived from sole possession, it is a presumption of law that occupation has taken place. If, on the other hand, opposite shores have been occupied at the same time, or if priority of occupation can be proved by neither of the riparian states, there is a presumption in favour of equal rights, and a state claiming to hold the entirety of a stream or lake must give evidence of its title, either by producing treaties, or by showing that it has exercised continuous ownership over the waters claimed. Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier. In 1648 Sweden, by receiving a cession of the river Oder from the Empire under the Treaty of Osnabrück, was held to have acquired territory to the exaggerated extent of two German miles from its bank as an inseparable accessory to the stream; and in the more recent case of the Netze in 1773 Prussia claimed with success that the cession of the stream should be interpreted to mean a cession of its shore. Where however the property in a river is vested by agreement in one of two riparian states for the purpose of bringing to an end disputes arising out of the use of its waters for mills and factories, as in the case of a treaty concluded in

1816 between Sardinia and the Republic of Geneva by which the Foron was handed over to the latter, it would be unreasonable to interpret a convention as granting more than what is barely necessary for its object[1].

Apart from questions connected with the extent of territorial waters, which will be dealt with later, certain physical peculiarities of coasts in various parts of the world, where land impinges on the sea in an unusual manner, require to be noticed as affecting the territorial boundary. Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water. To take a specific case, on the south coast of Cuba the Archipiélago de los Canarios stretches from sixty to eighty miles from the mainland to La Isla de Piños, its length from the Jardines Bank to Cape Frances is over a hundred miles. It is enclosed partly by some islands, mainly by banks, which are always awash, but upon which as the tides are very slight, the depth of water is at no time sufficient to permit of navigation. Spaces along these banks, many miles in length, are unbroken by a single inlet; the water is uninterrupted, but access to the interior gulf or sea is impossible. At the western end there is a strait, twenty miles or so in width, but not more than six miles of channel intervene between two banks, which rise to within

[1] Grotius, lib. ii. c. iii. § 18; Wolff, Jus Gentium, §§ 106–7; Vattel, liv. i. ch. xxii. § 266; De Martens, Précis, § 39; The Twee Gebroeders, iii. Rob. 339–40; Bluntschli, §§ 297–8, 301; Twiss, i. §§ 143–4. An instance of property by occupation is afforded by the appropriation of the river Paraguay, between the territory of the Republic of Paraguay and the Gran Chaco, which was effected by the Republic, and maintained until after its war with Brazil and the Argentine Confederation.

Sir Travers Twiss points out with justice that the doctrine which regards

seven or eight feet from the surface, and which do not consequently admit of the passage of sea-going vessels. In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt-water lake, and that the boundary of the land of Cuba runs along the exterior edge of the banks.

Protectorates over uncivilised and semi-civilised peoples.

States may acquire rights by way of protectorate over barbarous or imperfectly civilised countries, which do not amount to full rights of property or sovereignty, but which are good as against other civilised states, so as to prevent occupation or conquest by them, and so as to debar them from maintaining relations with the protected states or peoples. Protectorates of this kind differ from colonies in that the protected territory is not an integral portion of the territory of the protecting state, and differ both from colonies and protectorates of the type existing within the Indian Empire[1] in that the protected community retains, as of right, all powers of internal sovereignty which have not been expressly surrendered by treaty, or which

the shore as attendant upon the river, when the latter is owned wholly by one power, might lead, if generally applied, to great complications; and indicates that when it is wished to keep the control of a river in the hands of one only of the riparian powers, it is better to make stipulations such as those contained with respect to the southern channel of the Danube in the Treaty of Adrianople, than to allow the common law of the matter to operate. By that treaty it was agreed that the right bank of the Danube from the confluence of the Pruth to the St. George's mouth should continue to belong to Turkey, but that it should remain uninhabited for a distance inland of about six miles, and that no establishments of any kind should be formed within the belt of land thus marked out. Stipulations of such severity could rarely be needed, and in most cases could not be carried out; but the end aimed at, viz. the prevention of any use of the borders of the river for offensive or defensive purposes, and of any interference with navigation, could be obtained by prohibiting the erection of forts within a certain distance of the banks, and if necessary by specifying the places to which highroads or railways might be brought down.

[1] Cf. antea, p. 27, note.

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are not needed for the due fulfilment of the external obligations which the protecting state has directly or implicitly undertaken by the act of assuming the protectorate.

International law touches protectorates of this kind by one side only. The protected states or communities are not subject to a law of which they never heard; their relations to the protecting state are not therefore determined by international law. It steps in so far only as the assumption of the protectorate affects the protecting country with responsibilities towards the rest of the civilised states of the world. They are barred by the presence of the protecting state from exacting redress by force for any wrongs which their subjects may suffer at the hands of the native rulers or people; that state must consequently be bound to see that a reasonable measure of security is afforded to foreign subjects and property within the protected territory, and to prevent acts of depredation or hostility being done by its inhabitants. Correlatively to this responsibility the protecting state must have rights over foreign subjects enabling it to guard other foreigners, its own subjects, and the protected natives from harm and wrong doing[1].

[1] It is believed that all the states represented at the Berlin Conference of 1884-5, with the exception of Great Britain, maintained that the normal jurisdiction of a protectorate includes the right of administering justice over the subjects of other civilised states; and the General Act of the Brussels Conference of July, 1890, to which Great Britain assented, contemplates the adoption of measures in protectorates which could hardly, if at all, be carried out compatibly with the exemption of European traders and adventurers from the local civilised jurisdiction. The law regulating jurisdiction in the German protectorates, as modified by imperial decree of March 15, 1888, in fact declares that it is competent to the imperial authority to extend jurisdiction over all persons irrespectively of their nationality (Reichs-Gesetzblatt of March 15, 1888), and it may be inferred from a recent decision of the Cour de Cassation (Affaire Magny et autres; Cour de Cassation, Oct. 27, 1893) that jurisdiction will be exercised as a matter of course in all French protectorates. Great Britain, which until lately supposed that a protecting state only possesses delegated powers, and that an eastern state or community cannot grant jurisdiction over persons who are neither its own subjects nor subjects of the country to which powers are delegated, has now altered her views, and by the Pacific Order in Council of 1893, and the South Africa Orders in Council of 1891 and 1894, has asserted jurisdiction over both natives and the subjects of foreign states irrespectively of consent.

It may be taken that, with the exception perhaps of some small territories occupied for strategic reasons, the countries which states are tempted to bring under their protection are generally inhabited by a population of some magnitude, more or less barbarous, but governed by petty sovereigns according to a distinct polity. Whether a protectorate is imposed upon them, or whether chiefs and people alike welcome protection as a safeguard against exterminating feuds among themselves and against the danger of being overrun by European adventurers, they are in neither case ready to go so far as to abandon their polity; they are not ripe for the administration of European law as between themselves; and full sovereignty on the part of the protecting power, and such obedience to law as is rendered in India, could only be enforced at the point of the sword with an amount of difficulty and violence disproportionate to the result which could be obtained. In such circumstances it is evident that practice must be extremely elastic; different peoples and the same people at different times are susceptible of very various degrees of control; the social order which can be maintained among the tribes on the Niger cannot well be compared with that which exists in the Malay Peninsula; and the authority exercised, and the safety which can be secured to foreigners, both in that Peninsula [and in Nigeria] at the present moment is vastly greater than would have been possible in the early years of the protectorates exercised there. A foreign government then can have no right to ask that any definite amount of control shall be exercised in its interest, or that any definite organisation

In the Niger territories [until they were transferred to the Imperial Government in August, 1899] like jurisdiction was exercised by the Royal Niger Company in virtue of its charter; and in all protectorates which are covered by the Africa Order in Council of 1889 jurisdiction can be taken over subjects of the powers which adhered to the General Acts of the Conferences of Berlin and Brussels.

On the head of the powers which have been assumed by European States, and especially of Great Britain, in protectorates I may be permitted to refer to my 'Treatise on the Foreign Powers and Jurisdiction of the British Crown' (Part iii. chap. iii), where the subject is treated at large.

shall be established. Objection may be taken to an illusory protectorate, in which the mere shadow of a state name is thrown over the protected territory; but so long as a protecting state honestly endeavours to use its authority and influence through resident agents, it must be left to judge how far it can go at a given time, and through what form of organisation it is best to work. It may set up a complete hierarchy of officials and judges; or, if it prefers, it may spare the susceptibilities of the natives and exercise its authority informally by means of residents or consuls. Two requirements only need be satisfied; an amount of security must be offered, which in the circumstances shall be reasonable, and the administration of justice must in some way be provided for as between Europeans, and as between Europeans and natives[1].

[1] Protectorates are of course by no means new facts, but they may be said to be new international facts. Until lately they have been exercised in places practically beyond the sphere of contact with civilised powers. In this respect things are now totally changed, and very many questions arising out of such contact will undoubtedly, before long, press for settlement. To take but one example: are the native inhabitants of a protectorate to be regarded as subjects of the protecting state when temporarily within the territory or the protectorate of another civilised state? There can be no doubt that Germany will take the view that they are so: German law goes even so far as to allow them to be put by Imperial Ordinance on the same footing as German subjects with regard to the right of flying the Imperial flag. That other states will take a like view is practically certain. From the solution of such questions as this must come a tendency to fuller control. Indeed protection must be looked upon merely as a transitional form of relation between civilised and uncivilised states, destined, in course of time, to develop and harden into effective sovereignty. In the meantime practice is chaotic, and not always well considered. For instance, Great Britain has assumed a protectorate in North Borneo over the State of Sarawak, the Sultanate of Brunei, and the territories of the North Borneo Company, and in doing so has gratuitously embarrassed herself by expressly recognising their independence, and by specific limitations upon her own freedom of action, which, especially in the case of Brunei, are exceedingly likely to lead to difficulties with foreign powers. Germany has provided by law for her protectorates an elaborate organisation, which is practically identical in those directly administered by the crown, and in those managed through Colonial Companies, and which is based on the unrestricted sovereignty of the Emperor. It is, however, to be noted that German protectorates are probably only intended to be protectorates in name. The territories of the German Empire are enumerated by the second article of the Imperial

It may be worth while to notice, though the fact is an obvious result of the position occupied by a protecting state, that the territorial waters of the protected territory are, as between the protecting state and foreign countries, under the control of the former in the same manner as are its own waters, to the extent and within the scope that are consequent upon the powers assumed by it within the protected territory.

Spheres of influence.

The term 'Sphere of Influence' is one to which no very definite meaning is as yet attached. Perhaps in its indefiniteness consists its international value. It indicates the regions which geographically are adjacent to or politically group themselves naturally with, possessions or protectorates, but which have not actually been so reduced into control that the minimum of the powers which are implied in a protectorate can be exercised with tolerable regularity. It represents an understanding which enables a state to reserve to itself a right of excluding other European powers from territories that are of importance to it politically as affording means of future expansion to its existing dominions or protectorates, or strategically as preventing civilised neighbours from occupying a dominant military position.

The business of a European power within its sphere of influence is to act as a restraining and directing force. It endeavours to foster commerce, to secure the safety of traders and travellers, and without interfering with the native government, or with native habits or customs, to prepare the way for acceptance of more organised guidance. No jurisdiction is assumed, no internal or external sovereign power is taken out of the hands of the tribal chief; no definite responsibility consequently is incurred. Foreigners enter the country with knowledge of these circumstances, and therefore to a great extent at their peril. While then the European state is morally bound to exercise in their favour such influence as it has, there is no specific amount of good

Constitution, and the article can only be varied with the consent of the Imperial Legislature. There would be obvious inconveniences in meddling with the terms of the Constitution on the formation of each successive Colony.

order, however small, which it can be expected to secure. The position of a European power within its sphere of influence being so vague, the questions suggest themselves, whether any exclusive rights can be acquired as against other civilised countries through the establishment of a sphere, and in what way its geographical extent is to be ascertained.

The answer to both these questions lies in the fact that the phrase 'Sphere of Influence,' taken by itself, rather implies a moral claim than a true right. If international agreements are made with other European powers, such as those between Great Britain and Germany and Italy, the states entering into them are of course bound to common respect of the limits to which they have consented; and if treaties are entered into with native chiefs which without conveying any of the rights of sovereignty involved in a protectorate confer exclusive privileges or give advantages of a commercial nature, evidence is at least afforded that influence is existent, and it would be an obviously unfriendly act within a region where any influence is exercised to try to supplant the country which had succeeded in establishing its influence. But agreements only bind the parties to them; and no such legal results are produced by the unilateral assertion of a sphere of influence as those which flow from conquest or cession, or even from the erection of a protectorate. The understanding that a territory is within a sphere of influence warns off friendly powers; it constitutes no barrier to covert hostility. The limit of effective political influence is practically the limit of the sphere, if another European state is in waiting to seize what is not firmly held; and an aggressive state is not likely to consider itself excluded, until the state exercising influence is ready, if her legal situation be challenged, to take upon herself the responsibility of a protectorate. Even as between an influencing state and powers which are friendly in the full sense of the words, it has to be remembered that the exercise of influence is not in its nature a permanent relation between the European country and the native tribes; it is assented to as a temporary

phase in the belief, and on the understanding, that within a reasonable time a more solid form will be imparted to the civilised authority. It is not likely therefore that an influencing government will find itself able for any length of time to avoid the adoption of means for securing the safety of foreigners, and consequently of subjecting the native chiefs to steady interference and pressure. Duty towards friendly countries, and self-protection against rival powers, will alike compel a rapid hardening of control; and probably before long spheres of influence are destined to be merged into some unorganised form of protectorate analogous to that which exists in the Malay Peninsula.

Whether rights of navigation are possessed by states over rivers, or portions of rivers, not within their territory.

The general principle that a state possesses absolute proprietary rights over the whole area included within its frontier might be supposed to lead inevitably to the admission of a right on the part of every country to deal as it chooses with its navigable rivers, and consequently to prevent other states from navigating them, or to subject navigation to conditions dictated by its real or imagined interests, whether the navigable portion of a particular river is wholly included within its own boundaries, or whether the river begins to be navigable before they are reached. Conversely it might be supposed that neither foreign states in general nor co-riparian states could have any rights over waters contained within a specific territory, except through prescription or express agreement in the case of a particular river, or through an express agreement between the whole body of states with reference to all rivers.

It is generally asserted however that co-riparian states, and it is frequently said that states entirely unconnected with a river, have a right of navigation for commercial purposes, which sometimes is represented as imperfect, but sometimes also is declared to be dominant. Grotius alleged that on the establishment of separate property, which he imagined to have supervened upon an original community of goods as the result of convention, certain of the pre-existing natural rights were reserved for the

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general advantage, of which one was a right to use things which had become the subject of separate property in any manner not injurious to their owners. Passage over territory, whether by land or water, whether in the form of navigation of rivers for commercial purposes or of the march of an army over neutral ground to attack an enemy, was regarded by him as an innoxious use, and consequently as a privilege the concession of which it is not competent to a nation to refuse[1]. Whatever may be the value of this doctrine, it is the root of such legal authority as is now possessed by the principle of the freedom of river navigation. It was echoed with slight variations by most of the writers of the seventeenth and eighteenth centuries[2], and when states have been engaged in the endeavour to open a closed section of river to the trade of their subjects, the weapons of international controversy have been drawn in the main from the arsenal provided by the assumptions of Grotius and his successors.

Controversy with respect to the Mississippi,

After the Treaty of Paris in 1783, for example, both banks of the lower portion of the Mississippi having fallen under the dominion of Spain, and that power having closed the navigation of the part belonging to it to the inhabitants of the upper shores, a dispute took place on the subject between it and the United States. On behalf of the latter it was pointed out with truth that the passage of merchandise to and from the higher waters of the river would be not only innocent, but of positive advantage to the subjects of Spain; and it was argued with more questionable force that the freedom of 'the ocean to all men and of its rivers to all the riparian inhabitants' is a 'sentiment written in deep characters on the heart of man,' and that though the right

[1] Lib. ii. ch. ii. §§ 2, 10, and 13.

[2] e. g. Loccenius, De Jure Maritimo, lib. i. c. 6 (written in 1653); Rutherforth, Institutes of Natural Law, bk. ii. ch. ix (written in 1754); Wolff, Jus Gent. § 343; Vattel, liv. ii. ch. ix. §§ 117, 128–9, and ch. x. § 134.

Gronovius (1613–1671) and Barbeyrac (1674–1729) on the other hand, in their notes to Grotius, imply the right to prohibit navigation by conceding that of levying dues for the simple permission to navigate.

of passage thus evidenced may be so far imperfect as to be 'dependent to a considerable degree on the conveniency of the nation through which' persons using it were to pass, it was yet a right so real that an injury would be inflicted, for which it would be proper to exact redress, if passage were 'refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants as to render its use impracticable[1].' Again, in 1824, a series of negotiations were commenced between the United States and Great Britain with reference to the St. Lawrence, a right of navigating which was asserted by the former country as a riparian state of the upper waters of the river, and of the lakes which feed it. The arguments employed in support of the American contention were essentially the same as those which had been put forward in the case of the Mississippi. 'The right of the upper inhabitants,' it was said, 'to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element;' it is therefore 'a right of nature,' its existence is testified by the 'most revered authorities of ancient and modern times,' and when it has been disregarded, the interdiction of a stream to the upper inhabitants 'has been an act of force by a stronger against a weaker party.' Proprietary rights, on the other hand, 'could at best be supposed to spring from the social compact[2].'

The St. Lawrence.

Putting aside the assumption that an original convention as to several property was made between mankind, under which a right to use navigable waters was expressly reserved, as a

Examination of the doctrine that rights of navigation exist.

[1] Wheaton's History of the Law of Nations, 508–9; see also Jefferson's Instructions to the Commissioners appointed to negotiate with the Court of Spain, Am. State Papers, x. 135.

The dispute was ended in 1795 by the Treaty of San Lorenzo el Real, which opened the portion of the Mississippi belonging to Spain to the navigation of the United States.

[2] British and Foreign State Papers, 1830–1, pp. 1067–75. The proprietary rights exercised until after the Congress of Vienna by some of the petty German States, as for instance by Anhalt-Coethen and Anhalt-Bernburg, to the prejudice of Austria and Saxony, offer singular examples of 'acts of force done by a stronger against a weaker party.'

theory which can no longer be taken by any one as an argumentative starting-point; part of the foregoing reasoning, and the doctrine of writers who maintain the right of access and passage on the part of all states, depend upon the principle that the proprietary rights of individual states ought to be subordinated to the general interests of mankind, as the proprietary rights of individuals in organised societies are governed by the requirements of the general good; and the reasoning and doctrine in question involve the broad assertion that the opening of all water-ways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends, to which the rights of the individual are sacrificed by civil communities, are to the latter. Put in this form the doctrine has a rational basis, whether the assumption of fact by which it is accompanied is correct or not. But part of the foregoing reasoning on the other hand, and the opinion of writers who accord the right of navigation to co-riparian states, seem to imply the supposition that the fact of the use of a section of river belonging to a particular community being highly advantageous to the inhabitants of lands traversed by another portion of the stream in some way confers upon them a special right of use. The erroneousness of this view, when once it is plainly stated, can hardly require to be proved. The mere wants, or even the necessities, of an individual can give rise to no legal right as against the already existing rights of others. To infringe these rights remains legally a wrong, however slight in some cases may be the moral impropriety of the action. If a state forces the opening of a water-way between itself and the sea, on the ground that it has a right to its use as a riparian state, it simply commits a trespass upon its neighbour's property, which may or may not be morally justified, but by which it violates the law as distinctly, though not so noxiously, as an individual would violate it by making a track through a neighbour's field to obtain access to a high road. Some writers, who appear to be embarrassed with the difficulties with which the

claim of a right to navigate private waters is beset, envelop their assertion of it with an indistinctness of language through which it is hard to penetrate to the real meaning. A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose property is affected, and for sufficient cause it may be denied altogether. Whatever may be thought of the consistency of one part of this doctrine with another, there is in effect little to choose between it and the opinion of those who consider that the rights of property in navigable rivers have not as a matter of fact been modified with a view to the general good, and that they are independent of the wants of individuals other than the owners, but who recognise that it has become usual as a matter of comity to permit navigation by co-riparian states, and that it would be a vexatious act to refuse the privilege without serious cause[1].

[1] The opinions of writers belonging to the present century are singularly varied, and are not always internally consistent. Bluntschli (§ 314) roundly alleges that 'les fleuves et rivières navigables qui sont en communication avec une mer libre sont ouverts en temps de paix aux navires de toutes les nations.' Calvo (§§ 259, 290–1) says that where a river traverses more than one territory 'le droit de naviguer et de commercer est commun à tous les riverains;' when it is wholly within the territory of a single state, 'il est considéré comme se trouvant sous la souveraineté exclusive de ce même état;' it is however to be understood that 'les réglements particuliers ne doivent pas assumer un caractère de fiscalité, et que l'autorité ne saurait intervenir que pour faciliter la navigation et faire respecter les droits de tous,' so that the right of property seems in the end to be subordinated to the right of navigation. Fiore (§§ 758, 768) in the main follows M. Calvo. He declares that 'il carattere nazionale della navigazione fluviale,' in the case of a river flowing through more than one state, 'deriva necessariamente e giuridicamente dalla natura delle cose, cioè dall' indivisibilità del fiume, dal diritto naturale di libertà, e dal carattere internazionale del commercio;' but he holds that in the case of a river flowing through one state only 'questo colla più completa libertà e indipendenza può communicare e non communicare cogli altri stati;'—in other words, it may close the river if it chooses. Heffter (§ 77) declares on the one hand that each of the proprietors of a river flowing through several states, 'de même que le propriétaire unique d'un fleuve, pourrait, stricto jure, affecter les eaux à ses propres usages et à ceux de ses régnicoles, et en exclure les autres,' and on the other hand that 'on reconnaît avec Grotius, Pufendorf, et Vattel, au moins en principe, un droit beaucoup plus étendu, celui d'usage et de passage innocent, lequel ne peut être refusé

The question remains with what views the practice of states is most in accordance. Down to the commencement of the present century there can be no doubt that the paramount character of the rights of property was both recognised and acted upon. Although none of the European rivers running through more than one state seem at any part of their course to have been entirely closed to the riparian states, except the Scheldt which was closed by treaty, their navigation by foreign vessels was burdened with passage tolls and dues levied in commutation

absolument à aucune nation amie et à ses sujets dans l'intérêt du commerce universel.' Wheaton (Elem. pt. ii. ch. iv. § 11) considers that 'the right of navigating for commercial purposes a river which flows through the territories of different states is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the state affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.' Halleck (i. 147-8) says that 'the right of navigation for commercial purposes is common to all the nations inhabiting the banks' of a navigable river, subject to such provisions as are necessary to secure 'the safety and convenience' of the several states affected. De Martens (Précis, § 84) thinks that as a general rule the exclusive right of each nation to its territory authorises a country to close its entry to strangers, and though it is wrong to refuse them innocent passage, it is for the state itself to judge what passage is innocent, but at the same time the geographical position of another state may give it a right to demand and in case of need to force a passage for the sake of its commerce. Woolsey (§ 62) says, 'When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation. We see in this a decision based on strict views of territorial right, which does not take into account the necessities of mankind and their destination to hold intercourse with one another.' Phillimore (i. § clxx), in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says that 'it seems difficult to deny that Great Britain may ground her refusal upon strict law, but it is equally difficult to deny that in doing so she exercises harshly an extreme and hard law.' Klüber (§ 76) considers that 'l'indépendance des états se fait particulièrement remarquer dans l'usage libre et exclusif du droit des eaux, tant dans le territoire maritime de l'état, que dans ses rivières, fleuves, canaux, lacs et étangs. . . . On ne pourrait l'accuser d'injustice s'il défendait tout passage de bateaux étrangers sur les fleuves, rivières, canaux ou lacs de son territoire.' Finally, Twiss (i. § 141) lays down that 'a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream while it is passing through its territory.'

of the right of compulsory transhipment of cargoes. The first step towards freeing traffic was made in 1804, when the various Rhine tolls were abolished at the Congress of Rastadt by convention at the instance of the French government. In 1814 it was declared by the Treaty of Paris that the navigation of the Rhine should be free to all the world, and that the then coming Congress should examine and determine in what manner the navigation of other rivers might be opened and regulated. By an annex to the Act of the Congress of Vienna it was consequently agreed by the powers that navigable rivers separating or passing through more than one state should for the future be open to general navigation, subject only to moderate navigation dues. But neither at the Congress of Vienna nor in the Treaty of Paris was the right of co-riparian or of other foreign states to navigate territorial waters asserted as an existing principle, and effect was given to the intention of the powers in a series of conventions made between the states concerned. The Congress of Vienna therefore, though it intended to establish the principle of free navigation with regard to European rivers, respected the right of property in its mode of action, and it stopped short of applying the principle to rivers lying wholly within one state[1]. It would be difficult to show that any European country has admitted the propriety of the latter application; and the riparian states of the Elbe and the Rhine, by fresh arrangements entered into in 1880,

[1] De Martens, Rec. viii. 261 and Nouv. Rec. ii. 427 and 434. A list of the conventions dealing with the navigation of rivers separating or passing through different states is given by Heffter, Appendix viii.

In the text the intention of the Treaties of Paris and Vienna has been taken to be that which has been generally assumed and which is most in accordance with their language, but M. Engelhardt in the Revue de Droit International (xi. 363–81) gives reason to doubt whether it was intended at the time to give so complete a liberty of navigation as has been supposed, and shows that many of the regulations, to which the navigation of various European rivers passing through more than one state has been and is subjected, are inconsistent with the principle which was apparently laid down. M. Engelhardt is a warm advocate of the freedom of river navigation, but he is too accurate to regard it as legally established, and he admits that 'les libertés fluviales, telles qu'on les pratique aujourd'hui, sont essentiellement conventionnelles.'

PART II CHAP. II have made a distinct retrogression with respect to the conditions of international transport on those rivers. Under the rules of 1815, a vessel, after the manifest of its cargo had been examined at the office where the navigation dues were paid, was free from further inspection until arrival at its destination. The river was regarded as being, and was expressly stated to be, to that extent, ex-territorial by convention. By the late arrangements river traffic has been assimilated to that upon land; a vessel is obliged to present itself at the custom-house on each frontier that it passes; and the qualified ex-territoriality of the river-waters is totally destroyed[1].

In America, although the navigation of the great rivers of the United States is as a matter of fact open to foreign vessels for foreign trade, the government of that country appears to deny expressly that any right of such navigation exists. England again has always steadily refused to concede the navigation of the St. Lawrence to the United States as of right, and a controversy which existed for many years upon the subject was only put an end to in 1854 by a treaty which granted its navigation as a revocable privilege, and as part of a bargain in which other things were given and obtained on the two sides[2].

In South America the rivers of the Argentine Confederation were closed to foreign ships until 1853, when the Parana and Paraguay, in so far as they lie within Argentine territory, were opened for external trade to the commercial ships of all nations by treaties made between the Confederation and England, France, and the United States; subsequently in 1857 in a treaty with Brazil the navigation of those portions of both rivers, as well as the part of the Uruguay belonging to the two countries, was declared free, except for local traffic; but the navigation of their affluents was expressly reserved. The Republic of Uruguay had already by decree opened its internal waters to foreign commerce in 1853. Finally, the navigation of the Amazons, though

[1] Engelhardt, Rev. de Droit Int. xiii. 191.
[2] De Martens, Nouv. Rec. Gén. xvi. i. 498.

partially opened by Brazil in 1851 to the co-riparian state of Peru, remained closed, not only to non-riparian states, but to Ecuador, until 1867, when an imperial decree admitted all foreign vessels to the navigation of the Amazon, the Tocantins, and the San Francisco[1]. PART II CHAP. II

[The equivocal position occupied by China with regard to International Law renders her example of comparatively little moment or value as a precedent. Her notorious policy has been to exclude the foreigner from her inland waters, but in 1862 modified access to the Yangtse-Kiang was conferred upon British shipping, a privilege which was gradually extended to other Powers under 'most favoured nation' clauses. In August 1898 revised regulations of trade came into operation by which the merchant vessels of the Treaty Powers were authorised to trade on the Yangtse-Kiang at eight Treaty Ports, and to land and ship goods in accordance with special conditions at five Non-treaty Ports[2].]

Conclusions.

From the foregoing facts it appears that there are few cases in which rivers wholly within one state have been opened; that where rivers flowing through more than one state are now open, they have usually at some time either been closed, or their navigation has been subjected to restrictions or tolls of a kind implying that navigation by foreigners was not a right but a privilege; that there are still cases in which local traffic is forbidden to non-riparians; and that the opening of a river, when it has taken place, having been effected either by convention or decree has always been consistent with, and has some-

[1] Calvo, §§ 280–9. In opening the West African Conference of Berlin, Prince Bismarck committed himself to the statement that 'le Congrès de Vienne, en proclamant la liberté de la navigation sur les fleuves qui parcourent les territoires de plusieurs états, a voulu empêcher la séquestration des avantages inhérents à un cours d'eau. Ce principe a passé dans le droit public, en Europe et en Amérique.' Protocol of the Meeting of Nov. 15, 1884; Parl. Papers, Africa, No. 4, 1885, p. 9. Prince Bismarck's views did not commend themselves to the other members of the Conference: see ib. pp. 84–6.

[2] Hertslet, Commercial Treaties, xxi. p. 296.

times itself formed, an assertion of the paramount right of property, or in other words of the right of the owner of navigable waters to open or close them at will. It is clear therefore that the principle of the freedom of territorial waters, communicating with the sea, to the navigation of foreign powers has not been established either by usage or by agreements binding all or most nations to its recognition as a right. It is not less clear from the analysis of the views of its advocates that, if not so established, it has not been established at all; because the only reasonable basis on which it can be founded requires mankind to have declared that in the case of navigable rivers the ordinary rules of accepted law must be overridden for the sake of the general good. A marked tendency has no doubt shown itself during the present century to do away with prohibition, or to lessen restrictions, of river navigation by foreigners as a needless embarrassment to trade, but this has been the result, not of obedience to law, but of enlightened policy; and it may be said without hesitation that so far as international law is concerned a state may close or open its rivers at will, that it may tax or regulate transit over them as it chooses, and that though it would be as wrong in a moral sense as it would generally be foolish to use these powers needlessly or in an arbitrary manner, it is morally as well as legally permissible to retain them, so as to be able when necessary to exercise pressure by their means, or so as to have something to exchange against concessions by another power.

To what extent the sea can be appropriated.

It has become an uncontested principle of modern international law that the sea as a general rule cannot be subjected to appropriation. It is at the same time almost universally considered that portions of it are affected by proprietary rights on the part of the states of which the territory is washed by it; but no distinct understanding has yet been come to as to the extent which may be appropriated, or which may be considered to be attendant on the bordering land. In order to comprehend the uncertain application which the rights of appropriation and of retention as property thus receive in re-

lation to the sea, it is necessary to form a clear conception of the manner in which the views now commonly held have been gradually arrived at.

History of practice and opinion. Early usage.

At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well defined extent the waters stretching outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden[1]. In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognised; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting state for

[1] Daru, Hist. de Venise (written in 1819), liv. v. § 21; Selden, Mare Clausum, lib. ii. cc. 30–2; Loccenius, De Jure Marit. lib. i. c. 4. In 1485 it was agreed in a treaty between John II of Denmark and Henry VII that English vessels should fish in and sail over the seas between Norway and Iceland on taking out licences, which required to be renewed every seven years (Selden, loc. cit. c. 32). In the sixteenth century intestine wars in Scandinavia led to so long an enjoyment of the fisheries of the northern seas without licence by the English, that the latter set up a title to their use by prescription, in addition as it would seem to the claim of exclusive sovereignty over the seas in which they lay. Denmark maintained her pretensions, and some ill-treatment of English fishermen by the Danes gave rise to a serious dispute between the two countries (Justice, Dominion and Laws of the Sea, written in 1705, p. 168; and Rymer, Fœdera, xvi. 395).

PART II CHAP. II the cost and trouble to which it was put. From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported. In 1269, for example, Venice began to exact a heavy toll from all vessels navigating the Northern Adriatic. After paying the impost for a few years, Bologna and Ancona took up arms to free themselves from the burden, but the issue of their wars being unfortunate, they were compelled formally to acknowledge the sovereignty of Venice over the Adriatic, and to consent to pay the dues which she demanded. In 1299, it appears from a memorial presented to certain commissioners sitting in Paris to redress damages done to merchants of various nations by a French Admiral within the English seas, that procurators of the merchants and mariners of Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark, and Norway, acknowledged that exclusive dominion over the English seas, and the right of 'making and establishing laws and statutes and restraints of arms' and 'all other things which may appertain to the exercise of sovereign dominion' over them, were possessed by England. For nearly three centuries afterwards England kept the peace of the British seas either by cruisers in constant employment, or by vessels sent out from time to time[1].

Sixteenth century. At the period, then, when international law came into existence, the common European practice with respect to the sea was founded upon the possibility of the acquisition of property in it, and it was customary to look upon most seas as being in fact appro-

[1] Daru, Hist. de Venise, loc. cit.; Boroughs, The Sovereignty of the British Seas (1633), p. 28, and Justice, 134. The narrow seas were 'constantly kept' in the time of Boroughs, but at that date the ships so employed seem to have been stationed mainly for the purpose of receiving the salute. He however expressly says that within his memory ships were sent out to keep the peace of the seas, p. 61.

priated. But during the preceding century the exorbitant pretensions of Spain and Portugal had been preparing a reaction against this view. The former asserted dominion over the Pacific and the Gulf of Mexico, the latter declared the Indian Ocean and all the Atlantic south of Morocco to belong to it; while both pushed the exercise of proprietary rights to the extent of prohibiting all foreigners from navigating or entering their waters [1]. The claims of Portugal and Spain received a practical answer in the predatory voyages of Drake and Cavendish, and the commerce of Holland with the East; and in the region of argument they were met by the affirmation of the freedom of the seas. When Mendoza, the Spanish envoy at the English court, complained to Queen Elizabeth of the intrusion of English vessels in the waters of the Indies, she refused to admit any right in Spain to debar her subjects from trade, or from 'freely navigating that vast ocean, seeing the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof [2].' Elizabeth was indifferent to consistency. If the principle which she enunciated was correct, it applied as fully to the British seas as to those of the Indies. It was essentially the same as that on which Grotius relied in his attack upon the Portuguese in the 'Mare Liberum.' All property, he says, is grounded upon occupation, which requires that moveables shall be seized and that immoveable things shall be enclosed; whatever therefore cannot be so seized or enclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily

[1] Charles V styled himself 'Insularum Canariae, necnon insularum Indiarum et terrae firmae, maris oceani, &c. rex.' Selden, Mare Clausum, cap. 17. Ortolan (Dip. de la Mer, i. 121) gives the text of a Portuguese Ordonnance of pains and penalties: 'Assi natural como estrangeiro, ditas partes, terras, mares, de Guinea et Indias, et qualsquer outras terras et mares et lugares de nossa conquista, tratar, resgatar, nem guerrear, sem nossa licença et autoridade sob pena que fazendo o contrario moura por ello morte natural et por esso mesmo feito percão para nos todos seus beens moveis et de rays.'

[2] Camden, Hist. of Eliz., year 1580.

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free. The right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use, and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say in neither of the two ways in which it can be used[1].

Seventeenth century.

The doctrine with which the pretensions of Spain and Portugal was met went further than was necessary for the destruction of those pretensions, and it went further than any nation except Holland, which was imprisoned within the British seas, cared much to go. The world was anxious to secure the right of navigation, but it was willing that states should enjoy the minor rights of property and the general rights of sovereignty which accompany national ownership. Selden combated the views of Grotius in the interests of England; but while he maintained the right of appropriation in principle and as a customary fact, he declared that a state could not forbid the navigation of its seas by other peoples without being wanting to the duties of humanity[2]. The remaining jurists of the seventeenth century are in agreement with him. Molloy may be exposed to suspicion as an Englishman, but the opinion of Loccenius and Pufendorf is independent[3]. The latter argues that fluidity is not in itself a bar to property, as is proved by the case of rivers; that though the sea is inexhaustible for some purposes, its fish, and the pearls, the coral, and the amber that it yields, are not inexhaustible, and that 'there is no reason why the borderers should not rather challenge to themselves the happiness of a wealthy shore or sea than those who are seated at

[1] Mare Liberum, cap. 5. The treatise was first published in 1609. In his subsequent work, De Jure Belli, the doctrine is repeated (lib. ii. cap. ii. § 3), but with the illogical qualification (cap. iii. § 8) that gulfs and straits of which both shores belong to the same power can be occupied, because of their analogy to rivers, provided that the area of water is small in comparison with that of the land upon which it is attendant.

[2] Mare Clausum, lib. i. c. 20.

[3] Molloy (1646–1690), De Jure Marit. cap. v; Loccenius, lib. i. cap. iv; Pufendorf, bk. iv. ch. iv. §§ 6–9.

a distance from it;' finally, that the sea is a defence, 'for which reason it must be a disadvantage to any people that other nations should have free access to their shores with ships of war without asking their leave, or without giving security for their peaceful and inoffensive passage.' The extent over which dominion exists in any particular case is to be determined from the facts of effective possession or from treaties; and in cases which, after the application of these tests, are doubtful, it is to be presumed that the sea belongs to the states bordering on it so far as may be necessary for their defence, and that they also own all gulfs and arms.

In practice there was no radical change during the earlier part of the seventeenth century, except that as the seas had become safer, it was no longer necessary to keep their peace. Those consequences of the existence of property which made for the common good disappeared, while those which were onerous remained. Venice preserved her control over the Adriatic, and so jealous was she even of the semblance of a derogation from it, that in 1630 the Infanta Maria, when about to marry the King of Hungary and son of the Emperor, was not allowed to go to Triest on board her brother's fleet, but was obliged unwillingly to accept the hospitality and the escort of Venetian vessels [1]. In 1637 Denmark seized vessels placed outside Dantzig by the King of Poland to levy duties on merchantmen entering; she also increased the dues payable on passing the Sound, apparently to an excessive point, since wars with Sweden, Holland, and the Hanse Towns followed, which resulted in the exemption of Swedish ships, and in the regulation of the amount to be paid by the Dutch; and there can be little doubt that Danish pretensions in the northern seas were maintained, since the disputes with England which occurred in the sixteenth century were renewed, as will be seen presently, in the eighteenth [2]. England continued to require that foreigners intending to fish in the

[1] Daru, Hist. de Venise, loc. cit.

[2] Treaty of Christianopel, 1645 (Dumont, Corps Universel Diplomatique du Droit des Gens, vi. i. 312), and of Bromsebro in the same year (id. 314).

PART II CHAP. II German ocean should take out English licences, and when the Dutch attempted in 1636 to fish without them, they were attacked and compelled to pay £30,000 for leave to remain[1]. Though a refusal to accord the honours of the flag, by which maritime sovereignty was symbolised, in part caused the war of 1652 between England and Holland, and furnished a pretext for that of 1672, the latter power in the first instance only endeavoured to escape from performing a humiliating ceremony as due to a commonwealth which it admitted would have been due to an English king; and in the end it acknowledged its obligation in the Treaties of Westminster of 1654, of Breda, and of Westminster of 1674, in the last of which it was expressly recognised that the British seas extended from Cape Finisterre to Stadland in Norway[2].

[1] Proclamation of 1609 and 'The Proclamation for restraint of Fishing upon His Majesties Seas and Coasts without Licence' of May 10, 1636, ap. translation of the 'Mare Clausum' by J. H. Gent. 1663. Hume, Hist. of England, ch. lii.

[2] Lingard, Hist. of England, vol. xi. ch. ii; Hume, Hist. of England, ch. lxv; Dumont, vi. ii. 74, vii. i. 44 and 253. It was stipulated in the Treaty of Westminster that 'praedicti Ordines generales Unitarum Provinciarum debite, ex parte sua agnoscentes jus supra memorati Serenissimi Domini Magnae Britanniae Regis, ut vexillo suo in maribus infra nominandis honos habeatur, declarabunt et declarant, concordabunt et concordant, quod quaecunque naves et navigia ad praefatas Unitas Provincias spectantia, sive naves bellicae, sive aliae eaeque vel singulae, vel in classibus junctae, in ullis maribus a Promontorio Finis Terrae dicto usque ad medium punctum terrae van Staten dictae in Norwegia quibuslibet navibus aut navigiis ad Serenissimum Dominum Magnae Britanniae Regem spectantibus, obviam dederint, sive illae naves singulae sint, vel in numero majori, si majestatis Britannicae, sive aplustrum, sive vexillum Jack appellatum gerant, praedictae Unitarum Provinciarum naves aut navigia vexillum suum e mali vertice detrahentes supremum velum demittent, eodem modo parique honoris testimonio, quo ullo unquam tempore, aut in alio loco antehac usitatum fuit, versus ullas Majestatis Britannicae suae aut antecessorum suorum naves ab ullis Ordinum Generalium suorumve antecessorum navibus.'

Even crowned heads in person were expected to make practical acknowledgment of the dominion of England. Philip II of Spain, when coming to marry Queen Mary, was fired into by the English Admiral who met him for flying his own royal flag within the British seas; and in 1606 the King of Denmark, when returning from a visit to James I, was met off the mouth of the Thames by an English captain, who forced him to strike his flag (Admiralty Records).

PART II CHAP. II Eighteenth century. 1. Practice.

Between the beginning and the end of the seventeenth century however, notwithstanding the strenuousness with which England upheld her title to the British seas, so far as the salute due to her flag was concerned, there was on the whole a marked difference in the degree to which proprietary rights over the open sea were maintained. At the latter time they were everywhere dwindling away. By the commencement of the nineteenth century they had almost disappeared. England was embarrassed by the shadow of her claims, but she made no serious attempt to preserve the substance. The negotiations with the United States for a settlement of the question of the right of search, which had almost been brought to a satisfactory conclusion in 1803, were broken off at the last moment because the English government could not make up its mind to concede freedom from search within the British seas[1]; and so late as 1805 the Admiralty Regulations contained an order to the effect that 'when any of His Majesty's ships shall meet with the ships of any foreign power within His Majesty's seas (which extend to Cape Finisterre) it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty.' Since no controversies arose with respect to the salute at a time when opinion had become little favourable to the retention of such a right, it may be doubted whether the order was not allowed to remain a dead letter; and from that time, at any rate, nothing has been heard of the last remnant of the English claims. The pretensions of Denmark to the northern seas shrank in the course of the eighteenth century into a prohibition of fishery within sixty-nine miles of Greenland and Iceland; but the seamen of England and Holland disregarded the Danish ordinances; when their vessels were captured they

[1] Mr. King to Mr. Madison, British and Foreign State Papers, 1812–14, p. 1404.

were supported by their governments; and though some threats of war were uttered, in the end the fishing-grounds were tacitly opened[1]. The Baltic was the only other of the larger seas in which any endeavour was made to keep in existence the old proprietary rights. Denmark and Sweden tried to shut it against hostilities between powers not possessing territory on its shores, but the attempt failed before the maritime predominance of England, and the claim may be considered to have been abandoned with the commencement of the last century[2].

A new claim subsequently sprang up in the Pacific, but it was abandoned in a very short time. The Russian government published an Ukase in 1821 prohibiting foreign vessels from approaching within a hundred Italian miles of the coasts and islands bordering upon or included in that ocean north of the 51st degree of latitude on its American, and of the 45th degree on its Asiatic, shore; and it appears from a despatch addressed by the Russian Representative in the United States to the American Government that Russia conceived herself to be at liberty to regard the whole extent of sea north of the points indicated as being territorial. The pretension was, however, resisted by the United States and Great Britain, and was entirely given up by Conventions made between Russia and the former powers in 1824 and 1825[3]. More recently the United

[1] Denmark nominally continued to claim a breadth of twenty miles off the coasts of Iceland until 1872; by the fishing regulations of that year she voluntarily accepted the ordinary three-mile limit.

[2] In 1780 Denmark declared that 'le Roi a résolu pour entretenir la libre et tranquille communication entre ses Provinces de déclarer que la mer Baltique étant une mer fermée, incontestablement telle par sa situation locale,' &c. (De Martens, Rec. iii. 175); and in 1794 Sweden and Denmark agreed by a convention that 'la Baltique devant toujours être regardée comme une mer fermée et inaccessible à des vaisseaux armés des parties en guerre éloignées est encore déclarée telle de nouveau par les parties contractantes décidées à en préserver la tranquillité la plus parfaite' (id. v. 608).

[3] De Martens, Nouv. Rec. v. ii. 358, and vi. 684; Behring Sea Arbitration, British Case, p. 48. So late as 1875 Russia seems to have made a claim elsewhere to property in some considerable extent of water, for in that year Mr. Fish, the American Secretary of State, wrote 'There was reason to hope that the practice which formerly prevailed with powerful nations of regarding

States, since acquiring possession of the Russian territories in America, has endeavoured to separate the Behring Sea in its legal aspect from the Pacific Ocean, and has claimed as attendant upon Alaska, by virtue of cession from Russia, about two-thirds of its waters,—a space 1,500 miles long and 600 miles wide. The disputes with Great Britain which ensued, and the fact that they were submitted to the decision of a Court of Arbitration, are too well known to call for more than the barest reference. It is sufficient to note that the proprietary or territorial claim was tacitly dropped at an early stage of the proceedings, and that a pretension to jurisdictional rights of control for certain purposes, resting on a totally different basis, was substituted for it, or was at least insisted upon in its place[1].

2. Opinion of writers.

If we turn from history to the treatises of the eighteenth century the tendency to narrow the range of maritime occupation is perhaps still more strongly pronounced, though from the principles laid down being much too large to allow of admitted positive rules being brought into harmony with them, there is often some difficulty in knowing how far the writers who profess them would go. It is commonly stated that the sea cannot be occupied; it is indivisible, inexhaustible, and productive, in so far as it is productive at all, irrespectively of the labour of man; it is neither physically susceptible of allotment and appropriation; nor is there the reason for its appropriation which induced men to abandon the original community of goods[2]. If these

seas and bays usually of large extent near their coast as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law which limits maritime jurisdiction to a marine league from its coasts. We should particularly regret if Russia should insist on any such pretension.' Wharton's Digest, i. 106.

[1] [The award was published on the 15th of August, 1893. The full text is printed in the *Times* of the following day, and is also contained in De Martens, Nouveau Recueil Général, 2ème sér. xxi. 439.]

[2] Wolff, Jus Gentium, § 127, &c.; Vattel, liv. i. ch. xxiii. § 281; De Martens, Précis, § 43. Bynkershoek (1673–1743), De Dominio Maris, c. ii, Lampredi (Jur. Pub. Univ. Theorem. p. ii. cap. ii. §§ 8, 9), Azuni (1766–1827), Droit Maritime de l'Europe, pt. i. ch. ii. art. 1, all affirm the principle that the sea can be occupied in so far as it is used and guarded.

PART II CHAP. II objections to proprietary rights over the sea are sound they apply as much to one portion of it as to another. It might be expected therefore that the right of maritime occupation would be wholly denied. But it is not so. Enclosed seas, straits, and littoral seas were regarded as susceptible of occupation. The right of Sweden to the Gulf of Bothnia, of the Turks to the Archipelago, of England to St. George's Channel, of Holland to the Zuyder Zee, and of Denmark to both the Belts and to the Sound, was, it seems, 'uncontested[1];' and a margin varying in width from gunshot or a marine league from the shore to a space bounded by the horizon, or even according to one authority by a line a hundred miles from the coast, was universally conceded[2]. The parts of the sea which are thus excepted are large, so large indeed that they bring down the doctrines of jurists to very nearly the same results as are given by usage. It is evident that the minds of writers were still influenced by the traditional view that occupation is permitted in principle. Their word-play about the fluidity of water was really only intended to limit appropriation of the sea to those parts of it which could in fact be kept under the control of a state. It was admitted, even by those who most uncompromisingly assert the sea to be insusceptible of appropriation, that such parts of it as may be necessary to the safety of a state may be controlled. No one in truth was prepared unqualifiedly to abandon the view that the sea may be subjected to proprietary rights; still less was any one prepared

[1] De Martens, Précis, § 42.

[2] Bynkershoek (De Dominio Maris, c. ii), Valin (Commentaire sur l'Ordonnance de la Marine, ii. 688), Vattel (liv. i. ch. xxii. § 289), Moser (Versuch des neuesten Europäischen Völker-Rechts, v. 486), Lampredi (Jur. Pub. Univ. Theorem. p. iii. cap. ii. § 8), De Martens (Précis, § 153), and Lord Stowell in the Twee Gebroeders, iii Rob. 339, considered that the range of a cannon-shot, which was supposed to be a marine league, measured the breadth of territorial waters along the open coast. Rayneval thought the horizon was the boundary. Casaregis (De Commercio Disc. 136, i) pronounced for a hundred miles. Galiani, according to Azuni, and Azuni himself regarded the extent of permissible marginal appropriation to be an open question, which should be settled by treaties in each particular case. Azuni, Droit Maritime de l'Europe, pt. i. ch. ii. art. ii. § 14.

definitely to accept the opposite doctrine with all its consequences. It was universally felt that states cannot maintain effective occupation at a distance from their shores, and that free commercial navigation had become necessary to the modern world. There was therefore a general willingness to declare the ocean to be free, and to consider states as holding waters, which might fairly be looked upon as territorial, subject to a right of navigation on the part of other states. But acceptance of the freedom of the open seas merely marked a stage in a gradual settlement of the conditions under which occupation, when applied to the sea, may be held to be valid; and recognition of the right of passage only saddled private property with a kind of servitude for the general good.

Summary of the course of opinion and practice down to the beginning of the nineteenth century.

Down to the beginning of the present century then, the course of opinion and practice with respect to the sea had been as follows. Originally it was taken for granted that the sea could be appropriated. It was effectively appropriated in some instances; and in others extravagant pretensions were put forward, supported by wholly insufficient acts. Gradually, as appropriation of the larger areas was found to be generally unreal, to be burdensome to strangers, and to be unattended by compensating advantages, a disinclination to submit to it arose, and partly through insensible abandonment, partly through opposition to the exercise of inadequate or intermittent control, the larger claims disappeared, and those only continued at last to be recognised which affected waters the possession of which was supposed to be necessary to the safety of a state, or which were thought to be within its power to command. Upon this modification of practice it may be doubted whether theories affirming that the sea is insusceptible of occupation had any serious influence. They no doubt accelerated the restrictive movement which took place, but outside the realm of books they never succeeded in establishing predominant authority. The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid.

This principle may be taken as the formal expression of the results of the experience of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interests of a particular state with those of the body of states. As a matter of history, in proportion as the due limits of these conflicting interests were ascertained, the practical rule which represented the principle became insensibly consolidated, until at the beginning of the present century it may fairly be said that though its application was still rough it was definitively settled as law.

Present state of the question as to

It remains to see whether the rule is now applied more precisely, or, in the absence of sufficient precision, what would be a reasonable application of it.

1. Marginal seas;

Of the marginal seas, straits, and enclosed waters which were regarded at the beginning of the present century as being susceptible of appropriation, the case of the first is the simplest. In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast-guard. In fact also such a belt is always appropriated, because states reserve to their own subjects the enjoyment of its fisheries, or, in other words, take from it the natural products which it is capable of yielding. It may be added that, unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the state upon land; they would be exposed without recognised means of redress to the intended or accidental effects of acts of violence directed against themselves or others by persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose state consequently could not be made responsible for their deeds. Accordingly, on the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal

waters[1]. Their precise extent however is not so certain. Generally their limit is fixed at a marine league from the shore; but this distance was defined by the supposed range of a gun of position, and the effect of the recent increase in the power of artillery has not yet been taken into consideration, either as

[1] In addition to the earlier writers previously quoted with reference to marginal waters, see Klüber, §§ 128-30; Wheaton, Elem. pt. ii. ch. iv. §§ 6 and 10, Halleck, i. 134; Phillimore, i. §§ cxcvi-vii; Bluntschli, § 302; Fiore, § 787.

Some modern writers deny that states can have property in any part of the sea, but admit the existence either of sovereignty and jurisdiction, or of some measure of the latter only. Heffter (§ 74) supposes that 'la police et la surveillance de certains districts maritimes, dans un intérêt de commerce et de navigation, ont été confiées à l'état le plus voisin,' and that 'l'intérêt de la sûreté peut en outre conférer à un état certains droits sur un district maritime.' Ortolan (Dip. de la Mer, liv. ii. ch. 7 and 8), repeating the old arguments in favour of the view that the sea is insusceptible of appropriation, says, 'ainsi, le droit qui existe sur la mer territoriale n'est pas un droit de propriété; on ne peut pas dire que l'état propriétaire des côtes soit propriétaire de cette mer. . . . En un mot, l'état a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de juridiction.' Calvo (§ 244) alleges that 'pour résoudre la question (of the extent of territorial waters) d'une manière à la fois rationnelle et pratique, il faut d'abord, ce nous semble, ne pas perdre de vue que les états n'ont pas sur la mer territoriale un droit de propriété, mais seulement un droit de surveillance et de juridiction dans l'intérêt de leur défense propre ou de la protection de leurs intérêts fiscaux.' Twiss (i. § 173) seems implicitly to adopt the same doctrine by saying that as 'the term territory in its proper sense is used to denote a district within which a nation has an absolute and exclusive right to set law, some risk of confusion may ensue if we speak of any part of the open sea over which a nation has only a concurrent right to set law, as its maritime territory.'

If a correct impression is given by the historical sketch in the text, it is obvious that the doctrine of these writers is erroneous. It is besides open to the objections that—

1. It does not account for the fact that a state has admittedly an exclusive right to the enjoyment of the fisheries in its marginal waters.

2. As the rights of sovereignty or jurisdiction belonging to a state are in all other cases except that of piracy, which in every way stands wholly apart, indissolubly connected with the possession of international property, a solitary instance of their existence independently of such property requires to be proved, like all other exceptions to a general rule, by reference to a distinct usage, which in this case cannot be shown.

Sir Travers Twiss appears to be unduly affected by the existence of certain immunities from local jurisdiction which there is no difficulty in regarding as exceptional.

Grotius (De Jure Belli et Pacis, lib. ii. c. iii. § 13) is the source of the doctrine.

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supplying a new measure of the space over which control may be efficiently exercised, or as enlarging that within which acts of violence may be dangerous to persons and property on shore. It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international question, whether the three-mile limit has ever been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety that a state has theoretically the right to extend its territorial waters from time to time at its will with the increased range of guns. Whether it would in practice be judicious to do so; whether it would be politic for a country, which wished to avoid dangerous friction between itself and other nations, to act in this direction without having secured the concurrence of the more important maritime states, either by the negotiation of separate treaties, or through the acceptance of the principle in a conference of the powers, is a widely different matter, and one which is outside the purview of law. In any case the custom of regarding a line three miles from land as defining the boundary of marginal territorial waters is so far fixed that a state must be supposed to accept it in the absence of express notice that a larger extent is claimed[1].

[1] The question of the principle upon which the extent of marginal waters should be founded, and of the breadth of water that should be included, has of late attracted a considerable amount of attention. It is felt, and growingly felt, not only that the width of three miles is insufficient for the safety of the territory, but that it is desirable for a state to have control over a larger space of water for the purpose of regulating and preserving the fisheries in it, the productiveness of sea fisheries being seriously threatened by the destructive methods of fishing which are commonly employed, and in many places by the greatly increased number of fishing-vessels frequenting the grounds.

After being carefully studied and reported upon by a Committee of the

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2. Straits, gulfs, and bays.

It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than six miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than six miles wide they are wholly within the territory of the state or states to which their shores belong. This doctrine however is scarcely consistent with the view, which is also generally taken, that gulfs, of a greater or less size in the opinion of different writers, when running into the territory of a single state, can be included within its territorial waters; perhaps also it is not in harmony with the actual practice with respect to waters of the latter kind. France perhaps claims 'baies fermées' and other inlets or recesses the entrance of which is not more than ten miles wide[1]. Germany regards as territorial the waters within

Institut de Droit International, the subject was exhaustively discussed by the Institut at its meeting in Paris, in 1894, the exceptionally large number of thirty-nine members being present. With regard to the necessity of ascribing a greater breadth than three miles of territorial water to the littoral state there was no difference of opinion. As to the extent to which the marginal belt should be enlarged, and the principle upon which enlargement should be based, the same unanimity was not manifested; but ultimately it was resolved by a large majority that a zone of six marine miles from low water mark ought to be considered territorial for all purposes, and that in time of war a neutral state should have the right to extend this zone, by declaration of neutrality or by notification, for all purposes of neutrality, to a distance from the shore corresponding to the extreme range of cannon.

The decision of the Behring Sea Arbitral Tribunal does not constitute an addition to authority upon the question of the due extent of territorial waters. The award recognised the 'ordinary three-mile limit' as that outside of which the United States had no right of protection or property in the fur seals frequenting the Behring Sea. But M. de Courcel has since explained that the tribunal 's'est borné à constater que les parties étaient d'accord pour admettre que l'étendue de trois milles à partir de la côte comme formant dans l'espèce qui lui était soumise la limite ordinaire des eaux territoriales' (M. de Courcel to M. Aubert, ap. Ann. de l'Inst. de Droit Int., for 1894, p. 282). The tribunal therefore not only refused to legislate, to do which would of course have been beyond its province; it also refused to affirm that it found the three-mile limit to be, as a matter of fact, universally accepted. So far as it is concerned, the question of authoritative custom remains open.

[1] The latter at least was the general reservation made by the Fishery Treaty of 1839 with England (De Martens, Nouv. Rec. xvi. 954), but the

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bays or incurvations of the coast, which are less than ten sea miles in breadth reckoned from the extremest points of the land, and doubtless includes all the water within three miles outwards from the line joining such headlands. England would, no doubt, not attempt any longer to assert a right of property over the Queen's Chambers, which include the waters within lines drawn from headland to headland, as from Orfordness to the Foreland and from Beachy Head to Dunnose Point; but some writers seem to admit that they belong to her, and a recent decision of the Privy Council has affirmed her jurisdiction over the Bay of Conception in Newfoundland, which penetrates forty miles into the land and is fifteen miles in mean breadth. Authors also so little favourable to maritime property as Ortolan and De Cussy class the Zuyder Zee amongst appropriated waters. The United States probably regard as territorial the Chesapeake and Delaware Bays and other inlets of the same kind[1]. Many claims to gulfs and bays still find their place in the books, but there is nothing to show what proportion of these are more than nominally alive. In principle it is difficult to separate gulfs and straits from one another; the reason which is given for conceding a larger right of appropriation in the case of the

convention did not profess to be an expression of the law on the subject. The whole of the oyster-beds in the Bay of Cancale, the entrance of which is seventeen miles wide, were regarded as French, and the enjoyment of them is reserved to the local fishermen, but, again, the cultivation of the beds by the local French fishermen renders the case exceptional.

[1] Klüber, § 130; De Martens, Précis, § 42; Wheaton, Elem. pt. ii. ch. iv. §§ 7, 9; Heffter, § 76; Ortolan, Dip. de la Mer, liv. ii. ch. viii; Phillimore, i. §§ clxxxviii, cxcix; Halleck, i. 140; Bluntschli, § 309; Direct United States Cable Company Limited v. Anglo-American Telegraph Company Limited, 1877, L. R. ii. App. Cases, 394. It was apparently decided by the Queen's Bench in Reg. v. Cunningham (Bell's Crown Cases, 86) that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the channel which lies within Steepholm and Flatholm.

Whether the government of the United States would or would not now claim Delaware Bay, it at least did so in 1793, when the English ship Grange, captured in it by a French vessel, was restored on the ground of the territoriality of its waters. Am. State Papers, i. 73.

former than of the latter, viz. that all nations are interested in the freedom of straits, being meaningless unless it be granted that a state can prohibit the innocent navigation of such of its territorial waters as vessels may pass over in going from one foreign place to another. If that could be done, it might be necessary to impose a special restriction upon the appropriation of waters which by their position are likely to be used. Such however not being the case in fact, it is the power of control and the safety of the state which have alone to be looked to. The power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land, and the safety of the state may be more deeply involved in the maintenance of property and of consequent jurisdiction in the case of straits than in that of gulfs. Of practice there is a curious deficiency; but there is one recent case from which it would appear that both Great Britain and the United States continue to claim as territorial the waters of a strait, which is much more than six miles in width. By the treaty of Washington of 1846 it was stipulated that the boundary between the United States and British North America should follow the forty-ninth parallel of latitude to the middle of the strait separating Vancouver's Island from the continent, and from there should run down the middle of the Strait of Fuca to the Pacific. Disputes involving the title to various islands having arisen, the boundary question at issue between the two nations was submitted to the arbitration of the Emperor of Germany, and in 1873 a protocol was signed at Washington for the purpose of marking out the frontier in accordance with his arbitral decision. Under this protocol, the boundary, after passing the islands which had given rise to dispute, is carried across a space of water thirty-five miles long by twenty miles broad, and is then continued for fifty miles down the middle of a strait fifteen miles broad, until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatooch Island lighthouse on the

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American shore, the waterway being there ten and a half miles in width[1].

On the whole question it is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any state would now seriously assert a right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay, or still more to small bays, such as that of Cancale. If the width of marginal seas were extended to six miles, to the extreme range of cannon, or to any other specific limit, there could of course be no question as to the territorial character of straits or gulfs not more than double the breadth of the marginal limit[2].

Right of foreign states to the innocent use of the territorial seas of a state.

In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation[3]. The general consent of nations, which was seen to be wanting to the alleged right of navigation of rivers, may fairly be said to have been given to that of the sea. Even the earlier and more uncompromising advocates of the right of appropriation reserved a general right of innocent navigation; for more than two hundred and fifty years no European territorial marine waters which could be used as a

[1] Parl. Papers, North Am., No. 10, 1873.

[2] An interesting discussion bearing upon the subject of the above section took place in the course of the arguments before the Behring Sea Tribunal of Arbitration. Report of the Proceedings, pp. 1284–91.

[3] The case of gulfs or other inlets would seem to be upon a different footing, except in so far as they are used for purposes of refuge. Any right to their navigation must be founded on a right of access to the state itself.

thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right therefore must be considered to be established in the most complete manner[1].

This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all states. But no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war. Such a privilege is to the advantage only of the individual state; it may often be injurious to third states; and it may sometimes be dangerous to the proprietor of the waters used. A state has therefore always the right to refuse access to its territorial waters to the armed vessels of other states, if it wishes to do so.

Servitudes.

It is usual in works on International Law to enumerate a list of servitudes to which the territory of a state may be subjected. Amongst them are the reception of foreign garrisons in fortresses, fishery rights in territorial waters, telegraphic and railway privileges, the use of a port by a foreign power as a coaling station, an obligation not to maintain fortifications in particular places, and other derogations of like kind from the full enforcement of sovereignty over parts of the national territory. These and such like privileges or disabilities must however be set up by treaty or equivalent agreement; they are the creatures not of law but of compact. The only servitudes which have a general or particular customary basis are, the above-mentioned right of innocent use of territorial seas, customary rights over forests, pastures, and waters for the benefit of persons living

[1] Klüber (§ 76) is probably the only writer who denies the existence of the right. He says, 'on ne pourrait accuser un état d'injustice s'il défendait . . . le passage des vaisseaux sur mer sous le canon de ses côtes.'

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near a frontier, which seem to exist in some places, and possibly a right to military passage through a foreign state to outlying territory [1]. In their legal aspects there is only one point upon which international servitudes call for notice. They conform to the universal rule applicable to 'jura in re aliena.' Whether they be customary or contractual in their origin, they must be construed strictly. If therefore a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question.

[1] It is somewhat more than doubtful whether any instances of a right to military passage have survived the simplification of the map of Central Europe.

CHAPTER III

NON-TERRITORIAL PROPERTY OF A STATE

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In what non-territorial property of the state consists.

A STATE may own property as a private individual within the jurisdiction of another state; it may possess the immediate as well as the ultimate property in moveables, land, and buildings within its own territory; and it may hold property in its state capacity in places not belonging to its own territory, whether within or outside the jurisdiction of other states. With property held in the first of these ways international law has evidently nothing to do; that, on the other hand, which is held in the two latter ways falls within its scope; but the usages affecting property of which the immediate as well as the ultimate ownership is in the state, and which is within its own territory, are entirely included in the laws of war[1]; it is therefore only the last-mentioned kind of property which requires to be mentioned here, and this consists in—

1. Public vessels of the state.
2. Private vessels covered by the national flag.
3. Goods owned by subjects of the state, but embarked in foreign ships.

Public vessels of the state.

Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law[2]. The character of a vessel professing to be public is

[1] See Pt. iii. ch. iii.

[2] Ortolan, Dip. de la Mer, i. 181–6; Calvo, §§ 876–84.

usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by the competent authority within the state itself[1]. *À fortiori* attestation made by the government itself is a bar to all further enquiry[2].

The above rules are those which apply to the ordinary circumstance that a vessel, professing to be a public vessel of the state, enters a foreign country from the outside, or is met with on the high seas. But there are occasions when a vessel changes, or affects to change, her character while within foreign territory. Upon these other considerations must be brought to bear than those upon which the rules are founded. The vessel

[1] The Santissima Trinidad, vii Wheaton, 335-7; Ortolan, Dip. de la Mer, i. 181; Phillimore, i. § cccxlviii.

The admission of the word of the commander is sometimes regarded as obligatory. When the Sumter was allowed to enter the port of Curaçao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that 'le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par écrit.' Ortolan, loc. cit. i. 183.

[2] This is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term.

As recently as 1879 the English Court of Appeal decided in the above sense, reversing a judgment of Sir R. Phillimore. A Belgian mail packet, commanded by officers of the royal Belgian navy, but carrying merchandise and passengers, was sued in a claim for damage. On behalf of the King of the Belgians the facts were not contested, but it was declared that the vessel was in his possession as sovereign, and was a public vessel of the state. Behind this declaration the Court considered itself to be unable to go: it refused consequently to enquire into the effect which the fact that the vessel was partly employed in carrying merchandise and passengers might have upon her character. The Parlement Belge, L. R. 5 P. D. 197.

is bought, or she is built and fitted out to order, as a piece of mere merchandise; she is only private property owned by the state which has acquired her. Subsequently a commissioned officer arrives and takes command; but the act of commissioning a vessel is an act of sovereignty, and no act of sovereignty can be done within the dominions of another sovereign without his express or tacit permission. Without such leave a commission can only acquire value as against the state in which a vessel has been bought, or has been built and fitted out, at the moment when she issues from the territorial waters. Up to that time, though invested with minor privileges[1], she is far, if she be a ship of war, from enjoying the full advantages of a public character. It is needless to say that on the other hand if the vessel re-enters the territorial waters five minutes after she has left them she does so with all the privileges of a public vessel of her state. It is to be noted that tacit leave to commission a ship cannot be lightly supposed. A state must always be presumed to be jealous of its rights of sovereignty, and either strong circumstances implying recognition in the particular case, or the general practice of the state itself, must be adduced before the presumption can be displaced.

Instances also may, and occasionally do, occur in which the usual tests are not available, and in which it might be a question whether a vessel had not become a public vessel of a state, notwithstanding that the state in question refused to regard it as such. Though attestation by a government that a ship belongs to it is final, it does not follow that denial of public character is equally final; assumption and repudiation of responsibility stand upon a different footing. A foreign vessel of commerce, for example, flying the mercantile flag of its country, in entering a British port comes into collision with another vessel, and inflicts damage. It is found that the ship is engaged in the transport of soldiers, and that a naval officer is in command, but is not commissioned to the ship. Is this vessel to be

[1] Cf. postea, p. 198.

considered to have been so taken up into the service of its state as to have become a public vessel, and is her government therefore liable for the damage done; or are the soldiers passengers, and has the naval officer become the agent of the owners? The question is a somewhat delicate one. Probably the answer to it would depend upon whether the crew had, or had not, been placed under military law. Again, a British vessel is hired to act as tender to a foreign squadron engaged in naval operations; she leaves England with an English crew, in charge of her own master; on arrival she is put under the command of a naval officer, and flies the naval flag of his state with the distinctive mark of a chartered vessel; but the admiral in command of the squadron engages not to enforce military law on the crew. In this case the conclusion would seem to be more easy to arrive at. The flag is in itself sufficient to afford evidence of public character; its use is a public profession; it is unnecessary to go further and draw inferences from the whole circumstances of the case; the exemption from military law sinks into a disciplinary arrangement without international consequences. For determining cases of this kind it is evident that no general rules can be laid down; in each one the circumstances will more or less differ. All that can be said is, that the public character of a vessel may be inferentially shown from facts proving continued control by the state for state purposes, and that if the inference of public character is fairly drawn, a state is affected by responsibility for the acts of the vessel which is attributed to it.

Private vessels covered by the national flag.

Private vessels belonging to a state are those which, belonging to private owners, satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain, or the composition of the crew[1]. In common with vessels of war the flag is the apparent sign of the nationality of the ship, but as a merchant vessel is not in the same close relation to the state as a public vessel, and its commander, unlike the commander of the

[1] See Ortolan, Dip. de la Mer, pp. 746–52 (ed. 1864).

latter, is not an agent of the state, recourse is not had to his affirmation in proof of its character, which must be shown by papers giving full information as to its identity and as to its right to carry the flag displayed by it, or, in other words, as to whether it has conformed to the laws of its state[1].

Goods owned by subjects of the state, but embarked in foreign ships.

The conditions under which goods owned by subjects of a state, but embarked in foreign ships, are part of the property of the state are merely, that the owners must not have acquired a foreign character by domicil or service in another country. It will be seen later that it is possible for a person, without ceasing to be a subject of his state of origin, to be so intimately associated with a foreign state that the national character of property belonging to him may be affected by such association. It is for the competent courts to determine by what evidence the necessary facts must be proved, if disputed.

[1] See postea, pt. iv. ch. x.

CHAPTER IV

SOVEREIGNTY IN RELATION TO THE TERRITORY OF THE STATE

Enumeration of the points requiring notice.

It has been seen that a state possesses jurisdiction within certain limits, in virtue of its territorial sovereignty, over the person and property of foreigners found upon its land and waters, and that it is responsible, also within certain limits, for acts done within its boundaries by which foreign states or their subjects are affected[1]. The broad statement of the rights which a state possesses, and of the duties by which it is affected, in these respects in a time of general peace, which has already been made, sufficiently indicates the law upon most points connected with them; but there are some special rules, and practices claiming to be legal, which have not been touched upon, and there are others of which the applications require to be examined in detail. These may be referred to the following heads:—

1. Exceptions, real or alleged, to the general right of exercising jurisdiction over foreign persons and property.

2. Extent of the right of a state to require aid from foreigners within its territory in maintaining the public safety or social order.

3. An alleged right to take cognizance of acts done by foreigners beyond the limits of a state if the persons who have done them subsequently enter its territorial jurisdiction.

4. The right of asylum and of adopting a foreigner into the state community.

5. Responsibility of a state.

It is universally agreed that sovereigns and the armies of a

[1] See antea, pp. 47 et seq. For a particular limitation upon the free action of a state within its territory in time of civil war, see p. 35 n.

Doctrine of exterritoriality.

state, when in foreign territory, and that diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons, and in the case of sovereigns and diplomatic agents with respect to their retinue, that these immunities generally carry with them local effects within the dwelling or place occupied by the individuals enjoying them, and that public ships of the state confer some measure of immunity upon persons on board of them. The relation created by these immunities is usually indicated by the metaphorical term exterritoriality, the persons and things in enjoyment of them being regarded as detached portions of the state to which they belong, moving about on the surface of foreign territory and remaining separate from it. The term is picturesque; it brings vividly before the mind one aspect at least of the relation in which an exempted person or thing stands to a foreign state; but it may be doubted whether its picturesqueness has not enabled it to seize too strongly upon the imagination. Exterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the state in which they are. In this form there is evidently a danger lest the significance of the conception should be exaggerated. If exterritoriality is taken, not merely as a rough way of describing the effect of certain immunities, but as a principle of law, it becomes, or at any rate it is ready to become, an independent source of legal rule, displacing the principle of the exclusiveness of territorial sovereignty within the range of its possible operation in all cases in which practice is unsettled or contested. This of course is conceivably its actual position. But the exclusiveness of territorial sovereignty is so important to international law and lies so near its root, that no doctrine which rests upon a mere fiction can be lightly assumed to have been accepted as controlling it. In examining the immunities in question, therefore, it will be best to put aside for the present the idea of exterritoriality, and to view them solely by the light

of the reasons for which they have been conceded, and of the usage which has prevailed with respect to them.

Origin of the immunities usually classed under the head of exterritoriality.

The immunities which have been conceded to the persons and things above mentioned are prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity. The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolise something to which deference and respect are due, and they are consequently treated with deference and respect themselves. Supposing reasons of courtesy to be disregarded, immunities would still be required upon the ground of practical necessity. If a sovereign, while in a foreign state, were subjected to its jurisdiction, the interests of his own state might readily be jeopardised by the consequences of his position. In like manner the armed forces of a country must be at the disposal of that country alone. They must not be liable either to be so locked up as to be incapable of being used at will, or to be so affected by foreign interference as to lose their efficiency; and submission to local jurisdiction would open the door sometimes to loss of freedom, and sometimes to a supersession of the authority of the officer in command. Finally, it is for the interest of the state accrediting a diplomatic agent, and in the long run in the interest also of the state to which he is accredited, that he shall have such liberty as will enable him, at all times and in all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates. The first of these sets of considerations was perhaps that which formerly had the greater influence. When states were identified with their sovereigns, and the relations of states were in great measure personal relations of individuals, considerations of courtesy were naturally prominent; and to them must still be referred such established immunities as are not necessary

to the free exercise of the functions of the exempted person or thing. Those immunities, on the other hand, which may claim to exist on the score of necessary convenience, though in many cases they may have in fact owed their birth to courtesy, can now be more properly referred to convenience, both because it is a less artificial origin, and because it corresponds better with the present temper of states, and so with the reasons by which they would be likely to be guided in making any modifications of actual custom, or in defining unsettled practice.

Immunities of a foreign sovereign.

A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subjected to police or other administrative regulations, his house cannot be entered by the authorities of the state, and the members of his suite enjoy the same personal immunity as himself. If he commits acts against the safety or the good order of the community, or permits them to be done by his attendants, the state can only expel him from its territory, putting him under such restraint as is necessary for the purpose. In doing this it uses means for its protection analogous to those which one state sometimes employs against another, when it commits acts of violence for reasons of self-preservation without intending to go to war. The privileges of a sovereign consequently secure his freedom from all assertion of sovereignty over him or over anything or anybody attached to him in his sovereign capacity. On the other hand, he cannot set up an active exercise of his functions as a sovereign in derogation of the exclusive territorial rights of the state in which he is. If a crime is committed by a member of his suite, the accused person cannot be tried and punished within the precincts occupied by him; neither he nor his judges are able to take cognizance of an action brought by a foreigner against persons in attendance on him, and if there is nothing to prevent judgment being given

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in questions arising between the latter alone, the decision cannot at any rate be enforced. Criminals belonging to his suite must be sent home to be tried, and civil causes, whether between them or between subjects of other powers and them, must equally be reserved for the courts sitting within his actual territory. Again, a sovereign cannot protect in his house an accused person, not a member of his suite, who takes refuge from the pursuit of the local authorities. They cannot enter; but he is bound to surrender the refugee; and a refusal to give him up would justify the authorities in expelling the sovereign and in preventing the accused person by force from being carried off in his retinue [1].

Position of a sovereign who 1. assumes the character of a private individual for certain purposes;

Where, as occasionally happens, a sovereign has a double personality, where, that is to say, he for some purposes assumes the position of a private individual, or where, while remaining sovereign in his own country, he is a subject elsewhere, he is amenable to foreign jurisdiction in so far as he is clothed with

[1] Bynkershoek, De Foro Legatorum, c. iii; Bluntschli, §§ 129, 136-42, 150-3; Phillimore, ii. §§ civ-viii; Heffter, §§ 42 and 53-4; Calvo, §§ 530-2; Fœlix, Droit Int. Privé, liv. ii. tit. ii. c. ii. sect. 4 (ed. 1847); Klüber, § 49; De Martens, Précis, § 172. Phillimore and Klüber consider that a sovereign within foreign territory has civil jurisdiction over his suite, and De Martens seems to concede to him both civil and criminal jurisdiction.

The immunity of a sovereign as the representative of his state for anything done or omitted to be done by him in his public capacity has been affirmed by the English courts in De Haber v. the Queen of Portugal (xx Law Journal, Q. B. 488), and the French courts gave effect to the same principle in the cases of actions brought by a Me Masser against the Emperor of Russia, and by a M. Solon against the Viceroy of Egypt. [In the recent case of Mighell v. Sultan of Johore, L. R. 1894 i Q. B. 149, it was held by the Court of Appeal that a certificate from the Foreign or Colonial Office is conclusive evidence as to the status of an independent foreign sovereign temporarily resident in this country.]

If however a sovereign appeals to the courts of a foreign state or accepts their jurisdiction 'he brings with him no privileges that can displace the practice as applying to other suitors.' The King of Spain v. Hullett and Widder, i Clark and Finelly, H. of L. 333; the Newbattle, L. R. x P. D. 33; Calvo, § 549. [In the South African Republic v. La Compagnie Franco-Belge du Chemin de fer de Nord, L. R. 1893, i Ch. 90, it was held that a foreign sovereign suing in the courts of this country submits to the jurisdiction only to the extent that (1) he must give discovery, (2) cross proceedings in mitigation of the relief claimed by him can be taken against him.]

a private or subject character. Thus if he enters the military service of a foreign country he submits to its sovereignty in his capacity of a military officer, and if he travels incognito he is treated as the private individual whom he appears to be; as however in such cases he is only accidentally or temporarily a private person, and as he properly remains the organ of his country, he has the right of taking up his public position whenever the exercise of jurisdiction over him becomes inconsistent in his view with the interests of his state. He recovers the privileges of a sovereign at will by resigning his commission or declaring his identity. Whether his power of throwing off foreign jurisdiction is equally great when he is a subject, and as such is invested with permanent privileges, which the state cannot refuse to accord to him, may perhaps be open to question. If, for example, as occurred in the case of the Duke of Cumberland after his accession to the throne of Hanover, a foreign sovereign takes an oath of allegiance in England, and sits as an English peer by hereditary title, he may do acts in the exercise of his rights which lay him open to impeachment; and it would be at least anomalous and inconvenient that he should be able, whenever he may choose, to take up or lay down his privileges and responsibilities, and to protect himself at will against the consequences of the latter by putting on a mantle of inviolability.

2. is a subject in a foreign country.

When a sovereign holds property in a foreign country, which clearly belongs to him as a private individual, the courts of the state may take cognizance of all questions relating to the property, and the property itself is affected by the result of the proceedings taken in them[1].

[1] Bynkershoek, De Foro Legatorum, c. xvi; De Martens, Précis, §§ 172-3; Klüber, § 49; Heffter, §§ 53-4; Phillimore, ii. §§ cviii-ix; Bluntschli, §§ 131-4, 140; Calvo, §§ 547-9; Fiore, §§ 492 and 498-9.

It is considered by many writers that real property held by a sovereign in a foreign country as a private individual is alone subject to the local jurisdiction, and that personal property is exempt. The distinction appears also to be sometimes made in practice. It is however irrational in itself, and it is difficult to see, in view of the complex relations which in the present day grow out of the possession of personalty, how it would be possible to maintain

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Immunities of diplomatic agents:

The immunities of diplomatic agents are in outline the same as those of sovereigns. But the comparative shortness and rarity of the visits of the latter to foreign countries, and still more the circumstances in which they usually take place, have caused the law affecting the heads of states to remain a general doctrine, which there has been little, if any, opportunity of applying contentiously. With regard to diplomatic agents, on the other hand, it has become gradually settled through application in a large number of instances, about which questions have arisen. In the course of this settlement some of the immunities of ambassadors have perhaps been pared down below the point which would have been fixed for the privileges of sovereigns had like cases brought them into question.

1. from the criminal jurisdiction of the state;

A diplomatic agent cannot be tried for a criminal offence by the courts of the state to which he is accredited, and cannot as a rule be arrested. It is nevertheless a nice question whether he can be said to be wholly free from the local jurisdiction in respect of criminal acts done by him. If he commits a crime, whether against individuals or the state, application must ordinarily be made to the state which he represents to recall him, or if the case is serious he may be ordered to leave the country at once, without communication being previously made to his government. But if the alleged act is one of extreme gravity, he can be arrested and kept in custody while application for redress is being made, and can even be retained for other purposes than that of restraining his freedom of action pending the result of the application[1]. In 1717, for instance, Count Gyllenborg, the Swedish ambassador to England, was arrested for complicity in a plot against the Hanoverian dynasty, and instead of being immediately sent out of the kingdom, was kept for a time, of which part may be accounted for by the retention of the English

the exemption. It would be less inconvenient to relieve real property for certain purposes from the local laws than to allow personal property to escape their operation.

[1] Vattel, liv. iv. ch. vii. §§ 94–5; Klüber, § 211; Wheaton, Elem. pt. iii. ch. i. § 15; Heffter, § 42; Phillimore, ii. §§ cliv–viii; Bluntschli, §§ 209–10.

minister in Sweden, but of which part must have elapsed before the action of the Swedish government was known. In 1718 the Prince of Cellamare, the Spanish ambassador in Paris, having organised a conspiracy against the government of the Duke of Orleans, was arrested and retained in custody until news came of the safe arrival in France of the French ambassador at Madrid. No protest was made by the resident ambassadors from other courts in the latter case, and though dissatisfaction at the arrest of Count Gyllenborg was at first felt by some of the ministers accredited to England, the expression which had been given to it was withdrawn when the facts justifying the arrest were made known [1]. Arrests of this kind may be regarded, either, upon the analogy already applied in the case of sovereigns, as acts of violence done in self-defence against the state the representative of which is subjected to them, or as acts done in pursuance of a right of exercising jurisdiction upon sufficient emergency, which has not been abandoned in conceding immunities to diplomatic agents. The former mode of accounting for them seems forced because, though a diplomatic agent is representative of his state, he is not so identified with it that his acts are necessarily its acts; because in such cases as those cited the ambassador of a friendly power must *primâ facie* be supposed to be exceeding his instructions in doing acts inimical to the government to which he is accredited; and finally because such acts as those done in the instances mentioned, in going beyond the point of an arrest followed by immediate expulsion from the country, exceed what in strict necessity is required for self-protection. It appears to be the more reasonable course therefore to adopt the latter of the two modes of explaining them.

2. from the civil jurisdiction of the state.

The immunities from civil jurisdiction possessed by a diplomatic agent, though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness. The

[1] De Martens, Causes Célèbres, i. 101 and 149. He omits to notice that the complaints made with respect to the case of Count Gyllenborg by the ministers accredited to England were afterwards withdrawn.

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local jurisdiction cannot be exercised in such manner as to interfere however remotely with the freedom of diplomatic action, or with the property belonging to a diplomatic agent as representative of his sovereign; a diplomatic agent cannot therefore be arrested, and the contents of his house, his carriages, and like property necessary to his official position, cannot be seized. For some purposes also he is distinctly conceived of as being not so much privileged as outside the jurisdiction. Thus children born to him within the state to which he is accredited are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so. On the other hand, the jurisdiction of the state extends over real property held by him as a private individual, and he is subject to such administrative and police regulations as are necessary for the health or the safety of the community.

Difference of opinion as to its extent.

Beyond these limits there is considerable difference of opinion. Some writers consider that, except for the purposes of the regulations mentioned and in respect of his real property, his consent is required for the exercise of all local jurisdiction, and that consequently it can only assert itself in so far as he is willing to conform to its rules in non-contentious matters, or when he has chosen to plead to an action, or to bring one himself. In cases of the latter kind he consents to the effects of an action in so far as they do not interfere with his personal liberty or with the property exempted in virtue of his office; he makes his property liable, for example, to payment of costs and damages, and when he himself takes proceedings he obliges himself to plead to a cross action. In other matters, according to this view, he is subject to the laws of his own state, and satisfaction of claims upon him, of whatever kind they may be, can only be obtained, either by application to his sovereign through the government to which he is accredited, or by having recourse to the courts of his country[1]. Other authorities hold that in matters unconnected

[1] Vattel, liv. iv. ch. viii. §§ 110–6; Fœlix, liv. ii. tit. ii. ch. ii. sect. iv; Twiss, i. 305; Riquelme, i. 482; Halleck, i. 280, 284–6. Vattel, with whom

with his official position he is liable to suits of every kind brought in the courts of the country where he is resident, that the effects of such suits are only limited by the undisputed immunities above mentioned, and that consequently all property within the jurisdiction, other than that necessary to his official position, is subjected to the operation of the local laws. Thus he is exposed, for example, to actions for damages or breach of contract; if he engages in mercantile ventures, whether as a partner in a firm or as a shareholder in a company, his property is liable to seizure and condemnation at the suit of his creditors; if he acts as executor he must plead to suits brought against him in that capacity[1].

Wheaton (pt. iii. ch. i. § 17) seems to agree, admits that if a diplomatic agent engages in commerce, his property so employed is subject to the local jurisdiction, but to the extent only, it would appear, of the merchandise, cash, debts due to him, and other assets, if any, representing the capital actually used by him in the business. Heffter (§ 42) considers that exemption from jurisdiction, except by consent, though usual, is not obligatory.

It has been questioned whether the local courts become authorised to exercise jurisdiction by the mere renunciation of privilege by a diplomatic agent, or whether his renunciation is invalid unless it has been made with the consent of his government. In the United States it appears to have been decided that the permission of his government is necessary. It is, however, difficult to see why the courts should go out of their way to require that a condition shall be satisfied which is of importance only as between the diplomatic agent and his own state, and the fulfilment of which they have no means of ascertaining except through the agent himself. Nor is it easy to see what right they have to ask for any assurance beyond the profession of sufficient authority which is implied by the minister when he submits or appeals to them.

[1] De Martens, Précis, §§ 216–7; Klüber, § 210; Woolsey, § 92; Calvo, § 592. See also Bynkershoek, De Foro Legatorum, c. xvi.

Bluntschli (§§ 139–40 and 218) admits the competence of the civil tribunals in all cases in which an action could have been brought, supposing the diplomatic agent to be in fact in his own country, and in so far as he occupies in the foreign state 'une position spéciale, en qualité de simple particulier (négociant par exemple).' This view, which accommodates the competence of the tribunals to the fiction of exterritoriality, excludes the local jurisdiction in several directions with respect to which it is recognised under the above doctrine; but it may be assumed that the whole of the private property of the diplomatic agent is contemplated as being subject to the jurisdiction for the purpose of those cases of which cognizance can be taken.

The precise effect of the language of the authors cited in this and the foregoing note is in some cases very difficult to seize. The extremes of opinion

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Practice.

Of these two opinions the former is that which is the more in agreement with practice. In England it is declared by statute that 'all writs and processes whereby the goods or chattels' of a diplomatic agent 'may be distrained, seized or attached shall be deemed and adjudged to be utterly null and void to all intents, constructions and purposes whatsoever [1].' The law of the United States is similar. In France, during the last century, it was held that the only object of the immunity of an ambassador was to prevent him from being embarrassed in the exercise of his functions, and that, as his property can be seized or otherwise dealt with without preventing him from fulfilling his public duties, whatever he possesses in the country to which he is accredited is subjected to the local jurisdiction. From a wish, however, to avoid as much as possible any act derogating from the courtesy due to the ambassador as representative of his state, it was considered best to exert the territorial jurisdiction by means less openly offensive than that of allowing suits against him to be thrown into the courts. Accordingly when Baron Von Wrech, minister of Hesse-Cassel, endeavoured to leave France without paying his debts, his passport was refused until his creditors were satisfied. In the present century a change of view appears to have taken place, and the exemption of a diplomatic agent from the control of the ordinary tribunals is treated rather as a matter of right than of courtesy. An article

are easily distinguished; but many writers are either doubtful, or fail to express themselves clearly.

[1] 7 Anne, c. 12. The decisions upon this statute have been carried to the point of determining that the public minister of a foreign state accredited to England may not be sued against his will in the courts of that country, neither his person nor his goods being touched by the suit, while he remains such public minister. The decision was given with express reference to the contention of counsel that 'the action could be prosecuted to the stage of judgment, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister.' Magdalena Steam Navigation Company v. Martin, ii Ellis and Ellis, 111. [And in Musurus Bey v. Gadban, L. R. 1894, i Q. B. 535, following that case it was decided that so long as the ambassador of a foreign state is in this country and accredited to the sovereign the Statute of Limitations does not begin to run against his creditors.]

expressly conceding immunity was inserted in the original project of the civil code, and though it was expunged on the ground that it had no place in a code of municipal law, the courts have always treated it as giving expression to international law, and have acted in conformity with it. In Austria the civil code merely declares that diplomatic agents enjoy the immunities established by international law. In Germany the code in like manner provides that an ambassador or resident of a foreign power shall retain his immunities in conformity with international law; and the space which they are understood to cover may perhaps be inferred from the language used in 1844 by Baron von Bülow, who in writing to Mr. Wheaton with reference to a question then at issue between the governments of Prussia and the United States, said that 'the state cannot exercise against a diplomatic agent any act of jurisdiction whatever, and as a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned.' But for the use of the words 'in general' this statement of the views then entertained by the Prussian government would be perfectly clear, and considering the breadth with which the incapacity of a state to exercise jurisdiction is laid down, it seems reasonable to look upon them only as intended to except cases in which a diplomatic agent voluntarily appeals to the courts. In Spain the curious regulation exists that an ambassador is exempt from being sued in respect of debts contracted before the commencement of his mission, but that he is liable in respect of those incurred during its continuance. In Portugal the same distinction is made, but in a converse sense, an ambassador being exposed to proceedings in the courts in respect of such debts only as he has incurred antecedently to his mission. In Russia the ministry of foreign affairs is the sole medium for reclamations against a diplomatic agent[1].

[1] Fœlix, liv. ii. tit. ii. ch. ii. sect. iv; Phillimore, ii. §§ cxciv–ix; De Martens, Causes Cél. ii. 282; Wheaton, Elem. pt. iii. ch. i. § 17; Riquelme, i. 491.

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Custom is thus apparently nearly all one way; but the accepted practice is an arbitrary one, conceding immunities which are not necessary to the due fulfilment of the duties of a diplomatic agent; and in a few countries it is either not fully complied with or there may at least be some little doubt whether it would certainly be followed in all cases or not. The views expressed by so competent an authority as M. Bluntschli suggest that courts, at least in Germany, might take cognizance of a considerable number of cases affecting a diplomatic agent by looking upon his private personality as separable from his diplomatic character[1].

Immunities of the family and suite of a diplomatic agent.

The immunities of a diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and attachés, whether civil or military, forming part of the mission but not personally accredited, because of their necessity to him in his official relations, and perhaps also to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. These classes of persons have thus no independent immunity. That which they have, they claim, not as sharing in the representation of their state, nor as being necessary for its service, but solely through, and because of, the diplomatic agent himself. Hence in practice the immunity of servants and of other persons whose connexion with the minister is comparatively remote, is very incomplete; and it may even be questioned if they possess it at all in strict right, except with regard to matters occurring between them and other members or servants of the mission. It is no doubt generally held that they cannot be arrested on a criminal charge and that a civil suit cannot be brought against them, without the leave of their master, and that it rests in his discretion whether he will allow them to be

[1] The employment as diplomatic agent of a subject of the state to which he is accredited, is extremely rare; but it is scarcely necessary to say that, when once such a person is accepted by a state as the representative of a foreign country, his character as a subject is effaced in that of the diplomat. [See MacCartney v. Garbutt, L. R. xxiv. Q. B. D. 363, cited postea, p. 300 n.]

dealt with by the local authorities, or whether he will reserve the case or action for trial in his own country. But in England, at any rate, this extent of immunity is not recognised. Under the statute of Anne, the privilege of exemption from being sued, possessed by the servant of an ambassador, is lost by 'the circumstance of trading;' and when the coachman of Mr. Gallatin, the United States minister in London, committed an assault outside the house occupied by the mission the local authorities claimed to exercise jurisdiction in the case[1]. The English practice is exceptional; but it is not unreasonable. The inconvenience would be great of withdrawing cases or causes from the tribunals of the country in which the facts giving rise to them have occurred; and at the same time it cannot be seriously contended that either the convenience or the dignity of a minister is so affected by the exercise of jurisdiction over non-diplomatic members of the suite, and it might perhaps even be said, over non-accredited members of the mission, as to render exemption from it, except when such exemption is permitted by the diplomatic agent, an imperative necessity. Happily there is little difference in effect between the received and the exceptional doctrine. No minister wishes to shield a criminal, and there is no reason to believe that permission to exercise jurisdiction is refused upon sufficient cause being shown.

In order that a person in non-diplomatic employment shall be exempt from the direct action of the territorial jurisdiction it is

[1] In 1790 it was attempted at Munich to make a distinction between the members of a mission and the persons in attendance on them, and to assert local jurisdiction over the latter as of right. De Martens (Précis, 219 n., and Causes Cél. iv. 20) thought the distinction inadmissible, and it seems not to have been consistent with usage.

Vattel, liv. iv. ch. ix. §§ 121-4; De Martens, Précis, § 219; Klüber, §§ 212-3; Wheaton, Elem. pt. iii. ch. i. § 16, and Dana's note, No. 129; Halleck, i. 291; Bluntschli, §§ 211-15; Calvo, § 611.

It was formerly customary for ambassadors to exercise criminal jurisdiction over their suite, and there have been cases, as for example that of a servant of the Duc de Sully, French ambassador in England in 1603, in which capital punishment has been inflicted. But it has long been universally recognised that a diplomatic agent, of whatever rank, has no such power.

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always necessary that he shall be engaged permanently and as his regular business in the service of the minister. Residence in the house of the latter, on the other hand, is not required. Questions consequently may arise as to whether a particular person is or is not in his service in the sense intended; they have even sometimes arisen as to whether a person has been colourably admitted into it for the sake of giving him protection. With the view of obviating such disputes it is the usage to furnish the local authorities with a list of the persons for whom immunity is claimed, and to acquaint them with the changes which may be made in it as they occur.

Immunities of the house of a diplomatic agent.

It is agreed that the house of a diplomatic agent is so far exempted from the operation of the territorial jurisdiction as is necessary to secure the free exercise of his functions. It is equally agreed that this immunity ceases to hold in those cases in which a government is justified in arresting an ambassador and in searching his papers;—an immunity which exists for the purpose of securing the enjoyment of a privilege comes naturally to an end when a right of disregarding the privilege has arisen. Whether, except in this extreme case, the possibility of embarrassment to the minister is so jealously guarded against as to deprive the local authorities of all right of entry irrespectively of his leave, or whether a right of entry exists whenever the occasion of it is so remote from diplomatic interests as to render it unlikely that they will be endangered, can hardly be looked upon as settled. Most writers regard the permission of the minister as being always required; and Vattel refers to a case which occurred in Russia where two servants of the Swedish ambassador having been arrested in his house for contravening a local law, the Empress felt obliged to atone for the affront by punishing the person who had ordered the arrest, and by addressing an apologetic circular to the members of the diplomatic body[1]. In England however, in the case of Mr. Gallatin's coachman, the government claimed the right of arresting him

[1] Vattel, liv. iv. ch. ix. § 117; Klüber, § 207; Phillimore, ii. § cciv.

within the house of the minister, admitting only that as a matter of courtesy notice should be given of the intention to arrest, so that either the culprit might be handed over or that arrangements might be made for his seizure at a time convenient to the minister. In France it has been held by the courts that the privileges of an ambassador's house do not cover acts affecting the inhabitants of the country to which he is accredited; and when in 1867 a Russian subject, not in the employment of the ambassador, attacked and wounded an attaché within the walls of the embassy, the French government refused to surrender the criminal, as much upon the general ground that the fiction of exterritoriality could not be stretched to embrace his case, as upon the more special one, which was also taken up, that by calling in the assistance of the police the immunities of the house had been waived, if any in fact existed in the particular instance[1]. It does not appear whether the French government, in denying that the fiction of exterritoriality applied to the case in question, intended to imply the assertion of a right to do all acts necessary to give effect to its jurisdiction, and whether consequently it claimed that it would have had a right to enter the ambassador's house to arrest the criminal, or whether it merely meant that, if the criminal had been kept within the embassy and the ambassador had refused to give him up, a violation of the local jurisdiction would have taken place for which the appropriate remedy would have been a demand addressed to the Russian government to recall their ambassador and to surrender the accused person. Whether or not, however, the immunities of the house of a diplomatic agent protect it in all cases from entry by the local authorities, and if so whatever may be the most appropriate means for enforcing jurisdiction, it is difficult to resist the belief that there are cases in which the

[1] Dana, note to Wheaton, No. 129; Calvo, §§ 569–71. The latter writer is opposed to so large an assertion of the privileges of an ambassador's house as is found in most books. His opinion, as he was himself for some time minister at Paris, is peculiarly valuable on the point.

territorial jurisdiction cannot be excluded by the immunities of the house. If an assault is committed within an embassy by one of two workmen upon the other, both being in casual employment, and both being subjects of the state to which the mission is accredited, it would be little less than absurd to allow the consequences of a fiction to be pushed so far as to render it even theoretically possible that the culprit, with the witnesses for and against him, should be sent before the courts in another country for a trivial matter in which the interests of that country are not even distantly touched.

In one class of cases the territorial jurisdiction has asserted itself clearly by a special usage. If the house of a diplomatic agent were really in a legal sense outside the territory of the state in which it is placed, a subject of that state committing a crime within the state territory and taking refuge in the minister's residence could only be claimed as of right by the authorities of his country if the surrender of persons accused of the crime laid to his charge were stipulated for in an extradition treaty. In Europe, however, it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals, or to persons accused of crimes against the state[1]. A minister must refuse to harbour applicants for refuge, or if he allows them to enter he must give them up on demand. In

[1] Vattel, liv. iv. ch. ix. § 118; De Martens, Précis, § 220; Klüber, § 208; Phillimore, ii. §§ cciv–v; Bluntschli, § 200. Calvo (§ 585) still thinks that 'au milieu des troubles civils qui surviennent dans un pays, l'hôtel d'une légation puisse et doive même offrir un abri assuré aux hommes politiques qu'un danger de vie force à s'y réfugier momentanément.'

The European usage practically became fixed in the course of last century. The question was still open in 1726 when the Duke of Ripperda was taken by force from the house of the English ambassador at Madrid, with whom he had sought refuge; but by the time of Vattel it seems to have been settled that political offenders must be given up, though ordinary criminals might be sheltered; the right to receive the latter died gradually away with the growth of respect for public order, but De Martens, even in the later editions of his Précis, mentions it as being still recognised at some courts. For the details of the leading cases of the Duke of Ripperda and of Springer, a merchant accused of high treason, who took refuge in the English embassy at Stockholm in 1747, see De Martens, Causes Cél. i. 178, and ii. 52.

Central and Southern America matters are different. It is an instance of how large a margin of indefiniteness runs along the border of diplomatic privilege that the custom of granting asylum to political refugees in the houses of diplomatic and even of consular agents still exists in the Spanish-American Republics [1]. In 1870 the government of the United States suggested, without success, that the chief powers should combine in instructing their agents to refuse asylum for the future; but during the Chilean civil war of 1891 no less than eighty refugees were received into the American legation. A large number were given asylum by the ministers of several other states [2].

[1] Like reasons with those, which accounted for the maintenance of the custom of asylum in the South American Republics, revived it in Spain for a considerable time. During the Christino-Carlist war and the various subsequent troubles, to grant asylum was rather thought obligatory than permissible. Every politician and soldier had an interest in the continuance of a practice to the existence of which he might before long owe his life. The most notable example occurred in 1841, when the Danish Minister in Madrid, in sheltering a large number of conspirators against the government, and probably the person, of Espartero, rendered so essential a service to the party to which they belonged, that when it afterwards succeeded in grasping power, it expressed its gratitude by conferring on him the title of 'Baron del Asilo.' Asylum was granted at Madrid in 1848, in the houses of several of the ministers of Foreign Powers; and the practice was resumed during the revolutionary period between 1865 and 1875. In 1873 Marshal Serrano was sheltered by the British minister, and the minister of the United States promised asylum to another person, who however was not driven to claim fulfilment of the promise. An isolated instance occurred in Greece in 1862, when during the revolution of that date refuge was granted to persons in danger of their lives.

[2] Mr. Moore, in a series of exhaustive papers in the New York Political Science Quarterly (vol. vii, Nos. 1, 2, and 3), has accumulated a very large number of instances in which asylum has been granted in the various Central and South American States. The exercise of the custom seems generally to have been accompanied with more or less of friction between the foreign diplomatic agent and the local government.

Mr. Moore, while holding that the practice of giving asylum is not sanctioned by international law, thinks that I have asserted 'in terms too sweeping and absolute that the right to grant such asylum has long ceased to be recognised in European countries.' I do not however feel, after careful reconsideration of the matter by the light of Mr. Moore's able papers, that any modification of the opinion that I have expressed is called for. The exceptional survival or recrudescence of the practice in Spain, and the isolated case of Greece in 1862, do not seem to me to be sufficient to impart vitality to the custom elsewhere.

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Mode in which the evidence of a diplomatic agent is obtained for the courts.

When a crime has been committed in the house of a diplomatic agent, or by a person in his employment, it may occur that his evidence or that of one of his family or suite is necessary for the purposes of justice. In such cases the state has no power to compel the person invested with immunity to give evidence, and still less to make him appear before the courts for the purpose of doing so. It is customary therefore for the minister of foreign affairs to apply to the diplomatic agent for the required depositions, and though the latter may in strictness refuse to make them himself, or to allow persons under his control to make them, it is the usage not to take advantage of the right. Generally the evidence wanted is taken before the secretary of legation or some official whom the minister consents to receive for the purpose. When so taken it is of course communicated to the court in writing. But where by the laws of the country evidence must be given orally before the court, and in the presence of the accused, it is proper for the minister or the member of the mission whose testimony is needed to submit himself for examination in the usual manner. In 1856, a homicide having been committed at Washington in presence of the Dutch minister, he was requested to appear and to give evidence in the matter. He refused; offering however to make a deposition in writing upon oath, if his government should consent to his doing so. As the Dutch government supported him in the course which he took, his evidence was not given, and the affair ended by his recall being demanded by the government of the United States[1].

Immunities from taxation.

The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy however, most, if not all, nations permit the entry free of duty of goods intended for his private use[2].

[1] Calvo, §§ 583-4 and n.; Halleck, i. 294.

[2] Calvo, § 594; Bluntschli, § 222; Halleck, i. 298. But for the intolerance of religious feeling, which has always been ready to repress freedom at any cost of inconsistency, it would never have been necessary whether with or

Domicil of a diplomatic agent.

Two particulars only remain to be noted with respect to the legal position of a diplomatic agent. Of these the first is that he preserves his domicil in his own country, as a natural consequence of the fact that his functions are determinable at the will of his sovereign, and that he has therefore no intention of residence. The second is that notwithstanding the general rule that acts intended to have legal effect, in order to have such effect in the country where they are done, must conform to the territorial law, a diplomatic agent may legalise wills and other unilateral acts, and contracts, including perhaps contracts of marriage, made by or between members of his suite. It is said by some writers that a diplomatic agent may also legalise marriages between subjects of his state, other than members of his suite, if specially authorised to do so by his sovereign; but this view is unquestionably erroneous. There is no general custom which places a state under an obligation to recognise such marriages, and in some states they certainly will not be recognised[1].

His power to legalise acts done according to the forms prescribed in his own country.

without the assumption of exterritoriality to lay down expressly that a diplomatic agent has a right to the exercise of his religion in a chapel within his own house, provided that he does not provoke attention by the use of bells. As the local authorities have no right of entry, except for the reasons mentioned above, they ought to be officially ignorant of everything occurring in the house, so long as it is not accompanied by external manifestations. Most writers are, however, careful to state that the privilege exists. Its possession is now happily too much a matter of course to make it worth while to notice it in the text.

[1] The French courts would probably recognise the marriage of any two foreigners performed in the Embassy of their country; but Germany, for example, refuses to admit the validity of a marriage between two foreigners who are not members of the ambassadorial suite.

Even in countries where the marriage of two foreigners may be permitted, it is to be remembered that the marriage of a subject of the state with a foreigner in the house of the ambassador of the state to which the foreigner belongs, and according to the laws of the state, would not generally be held to be good, and in some cases decisions to this effect have been given. See for example Morgan v. French, in which the Tribunal Civil de la Seine pronounced null a marriage between an Englishman and a French subject, performed at the English Embassy (Journal de Droit Int. Privé, 1874, p. 72), and the case of a marriage between an Austrian and an Englishwoman, celebrated in English form at the English Embassy in Vienna, which was held null by the Supreme Court of Austria, 17th Aug. 1880

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Immunities of armed forces of the state.

The law with respect to the immunities of armed forces of the state in foreign territory has undergone so much change, or at least has become so much hardened in a particular direction, with the progress of time, and so much confusion might be imported into it, at any rate in England, by insufficient attention to the date of precedents and authorities, that the safest way of approaching the subject will be by sketching its history.

History of opinion and usage.

Either from oversight or, as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter. Zouche is the only jurist of the seventeenth century who notices it, and the paragraph which he devotes to the immunities of armies and fleets is scarcely sufficient to give a clear idea of his views as to their extent[1]. Casaregis, in the

(note to Gillespie's translation of Von Bar, p. 493). Belgium allows the marriage of a Belgian man with a foreign woman in a foreign country on express permission being obtained from the Minister of Foreign Affairs, but it does not recognise a like marriage in Belgium; Germany, while rigidly maintaining her own territorial jurisdiction, permits marriage by her diplomatic agent between foreigners and German subjects of either sex. [It should be noted that under the Civil Code of the German Empire (Jan. 1, 1900) domicil is no longer the ruling principle, as regards *status* and capacity, its place having been taken by nationality or allegiance.] Practice in the matter is in a state of discreditable confusion and uncertainty, the effects of which have been painfully felt by not a few women. On the whole subject cf. Lawrence, Commentaire, iii. 357–78 and Stocquardt in the Rev. de Dr. Int. 1888, pp. 260–300. [See also the same author's most recent summary of the Continental Laws of Marriage in his studies on Private International Law (1900), and Rev. de Dr. Int. 1899, pp. 357–8, for a suggested international codification of the conditions necessary to give validity to marriages contracted abroad.]

[1] Dissertation concerning the punishment of Ambassadors, Trans. by D. J. p. 26 (1717). [The original was published in 1657.] It is curious and interesting to find, as appears from a quotation in Zouche (1590–1661), that the fiction of the exterritoriality of an army had come into existence, and seems to have been recognised, in the time of Baldus (circa 1400). Bartolus (1313–1356) also said, according to Casaregis (circa 1670), 'quod licet quis non habet territorium si tamen habeat potestatem in certas personas, propter illas personas dicitur habere territorium.'

eighteenth century, concedes exclusive jurisdiction to a sovereign over the persons composing his naval and military forces and over his ships, wherever they may be, on the ground that the exercise of such jurisdiction is necessary to the existence of a fleet or army [1]. Lampredi, on the other hand, asserts it to be the admitted doctrine that an army in foreign territory is subject to the local jurisdiction in all matters unconnected with military command; he maintains that the crew of a vessel of war in a foreign harbour is subjected to the same extent as land forces to the jurisdiction of the sovereign of the port, and that the vessel itself is part of his territory; he expressly adds that a criminal who has found refuge on board can be taken out of the ship by force. Such jurisdiction as he permits to be exercised on behalf of the sovereign of the military or naval force he rests, like Casaregis, upon the necessities of military command [2]. In 1794

[1] Discursus de Commercio, 136, 9: 'Quum vero de exercitu, vel bellica classe, seu militaribus navibus, agitur, tunc tota jurisdictio super exercitum vel classem residet penes principem, aut ejus ducem, quamvis exercitus vel bellica classis existat super alieno territorio vel mari, quia ex belli consuetudine illa jurisdictio quam habet rex, seu princeps, aut illorum duces super exercitum prorogatur de suo ad aliorum territorium; tum quia absque tali jurisdictione, exercitus vel classis conservari et consistere non posset tum etiam ex aliis rationibus de quibus apud infra scriptos doctores;' of whom he gives a long list. 'Quamobrem omnes et quoscunque, militiae suae, vel terrestris, vel maritimae, milites et homines, etiam in alieno territorio delinquentes, princeps, vel illius dux, qualibet poena, etiam capitali plectere valet, vel quoscunque alios jurisdictionis actus erga eos exercere, ac si in proprio territorio maneret.'

Upon the above passages Sir A. Cockburn, in his Memorandum appended to the Report of the Fugitive Slave Commission, 1876 (p. xxxiii), argues that there is in it 'no express assertion as to exterritoriality in the sense in which that term is now used, namely, as excluding the local jurisdiction.' There is no doubt no such express assertion, but exclusive jurisdiction is necessarily implied in the language which gives a sovereign the same jurisdiction over his troops and naval forces in foreign countries as he has over them at home. In his own dominions he does not admit concurrent jurisdiction.

[2] The illusion of exterritoriality, he says, 'sparisce subito chè si rifletta che questo esercizio di giurisdizione non è fondato sul gius del territorio, ma sulla natura del comando militare, il quale s'intende restare intatto e nel suo pieno vigore ogni volta che il sovrano del luogo si contenta di ricevere una nave di guerra come tale. . . . Escluso questo comando militare, che per la qualità e natura della nave da guerra resta intatto, per ogni altro riguardo e la nave s'intende territorio del sovrano del porto, e gli uomini di essa

a similar view was taken by the Attorney-General of the United States. An English sloop of war had entered the harbour of Newport in Rhode Island. While she was there it was reported that several American citizens were detained on board against their will. The General Assembly of the State having taken the matter into consideration resolved that five persons should go on board to ascertain whether the alleged facts were true, and the captain, who was on shore, acting apparently under some personal constraint, furnished the deputation with a letter requiring the officer in temporary command to afford them every assistance. On an investigation being made on board it was found that six men were Americans. These were discharged by order of the captain, and the vessel was then allowed to take in provisions, of which she was in want, and which she had until then been prevented from obtaining. The British Minister at Washington complained that 'the insult' was 'unparalleled, since the measures pursued were directly contrary to the principles which in all civilised states regulate cases of this nature; for if on the arrival of a ship of war in a European port, information be given that the ship of war has on board subjects of the sovereign of that port, application is made to the officer commanding her, who himself conducts the investigation, and if he discovers that any subjects be on board of his vessel, he immediately releases them; but if he be not satisfied that there be any such, his declaration to that effect, on his word of honour, is universally credited.' The question being referred to the Attorney-General by his government, he says

sottoposti alla sua giurisdizione. Lo che è tanto vero che è dottrina comune che anche un esercito straniero, che passa e dimora sopra l'altrui territorio, è sottoposto alla giurisdizione del luogo, escluso l'esercizio del comando militare, che resta intatto appresso il suo comandante per il consenso tacito del sovrano medesimo, il quale avendo concesso il passo o la dimora all' esercito forestiero s'intende aver concesso anche il comando militare, senza di cui esercito esser non può per la nota regola di ragione che concesso un diritto, s'intende concesso tutto ciò senza cui quel diritto esercitare non si potrebbe.' Del Commercio dei Popoli Neutrali in Tempo di Guerra, p[te] 1ma, § x. Azuni (pt. i. ch. iii. art. vii) appropriates the language of Lampredi without alteration.

that 'the laws of nations invest the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which he comes,' and 'conceives that a writ of habeas corpus might be legally awarded in such a case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ may be directed to issue [1].' A few years later an opinion to the same effect was given by a subsequent Attorney-General. In a case which arose in connexion with the English packet Chesterfield he advised that 'it is lawful to serve civil or criminal process upon a person on board a British ship of war lying in the harbour of New York;' in coming to this conclusion he relied partly upon general considerations and partly upon an Act of Congress, of June 5, 1794, which enacted 'that in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state, it shall be lawful for the President of the United States to employ such part of the land and naval force of the United States or of the militia thereof as shall be judged necessary [2].' It is said that the same doctrine

[1] Report of the Commission on Fugitive Slaves, p. lxxiii. Mr. Rothery argues with reference to this case that the British minister 'nowhere complains of the illegal character of these proceedings, or that the local authorities had no right to demand the delivery up of American subjects held on board against their will; there is here no claim of exterritoriality; no pretence that a ship of war is exempt from interference by the local authorities.' The word 'illegal' is no doubt not used; but it is not commonly used in diplomatic notes. In stating a custom as universal, and stigmatising action at variance with it as being contrary to the 'principles' guiding nations in such matters, the minister clearly indicates that the measures complained of were in his view illegal. In his opinion the law probably was this:—The captain of a ship of war has no right to keep subjects of a foreign state on board against their will within the territorial waters of their own country; the authorities of the state have no right to enter the ship or to employ measures of constraint; if they have reason to believe that subjects of the state are improperly kept on board, and they are unable to procure their release from the commander, their remedy is by complaint to his sovereign.

[2] Report of Commission on Fugitive Slaves, p. lxxv. The act must of

PART II CHAP. IV as that laid down by the Attorney-General of the United States in 1794 would probably be held by the courts of Great Britain[1]; it is certain that the pretension to search vessels of war, so long made by England, was incompatible with an acknowledgment that they possess a territorial character; and Lord Stowell, on being consulted by his government in 1820, with reference to the case of an Englishman who took refuge on board a man of war at Callao after escaping from prison, into which he had been thrown for political reasons, answers the question, 'whether any British subject coming on board one of his Majesty's ships of war in a foreign port escaping from civil or criminal process in such port, and from the jurisdiction of the state within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the kingdom of Great Britain and Ireland,' by saying that he had 'no hesitation in declaring that he knew of no such right of protection belonging to the British flag, and that he thought such a pretension unfounded in point of principle, injurious to the rights of other countries, and inconsistent with those of our own;' and added that 'the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking' the person whose case was under discussion 'out of the British vessel[2].'

So far the opinion of Casaregis and the statement made by the British minister at Washington in 1794 with respect to the then custom of nations has to be weighed against the opinion of Lampredi and the views which, there is strong reason to believe, were predominant in the United States and England. But the doctrines held in the United States have changed, and the practice of England has not been uniform. In 1810 Chief Justice Marshall took occasion, in delivering judgment in a case turning upon the competence of the judicial tribunals of a state

course be read subject to whatever may be the ascertained rules of international law from time to time.

[1] Phillimore, i. § cccxlvi.

[2] Report of Commission on Fugitive Slaves, p. lxxvi.

to entertain a question as to the title to or ownership of a public armed ship in the service of a foreign country, to lay down the principles of law which in the opinion of the Supreme Court were applicable to a vessel of war in the territorial waters of another state. According to him the 'purposes for which a passage is granted' to the troops or ships of a foreign power 'would be defeated, and a portion of the military force of a foreign, independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force' unless the exercise of jurisdiction were abandoned by the territorial sovereign; 'the grant of a free passage' or the permission to enter ports 'therefore implies a waiver of all jurisdiction.' The immunity thus conceded rested no doubt upon a consent to the usage, which might be withdrawn by any particular state, but it could only be withdrawn by notice given before the entry of the force over which it might be attempted to exercise jurisdiction, and 'certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.' The doctrine is afterwards qualified by the proviso that a ship entering the ports of a foreign power shall 'demean herself in a friendly manner[1].' The expression is somewhat vague, and may possibly leave a vessel subject to the ordinary

[1] The Schooner Exchange v. M'Faddon, vii Cranch, 141–6. The view taken by Justice Story (La Santissima Trinidad, vii Wheaton, 353) of the intention of Chief Justice Marshall seems to be different from that which is taken above. It is to be noticed, however, that in paraphrasing the language of the Chief Justice he uses the expression 'according to law and in a friendly manner' instead of the words 'in a friendly manner' alone, thus wholly changing the effect of the clause. As also he puts sovereigns and public vessels of war on the same footing, he either gives larger immunities to ships than he would appear at first sight to be willing to concede, or he rejects the universally received doctrine as to the immunities of sovereigns. Wheaton (pt. ii. ch. ii. § 9) evidently regards the language of the Chief Justice as referring only to 'acts of hostility,' and as merely sanctioning the use by 'the local tribunals and authorities' of such 'measures of self-defence as the security of the state may require.'

jurisdiction of the courts in so far as a state act of which it is the vehicle renders it obnoxious to the territorial law. Such a construction would however be forced, and in any case the vessel is evidently regarded as covering the persons on board her from both civil and criminal jurisdiction in respect of all matters affecting them only as individuals. The opinion of Wheaton and Halleck concurs with that of Chief Justice Marshall, upon whose judgment indeed it may be regarded as founded. Dr. Woolsey goes further, and adopts the doctrine of exterritoriality, which was also asserted by Mr. Cushing, when Attorney-General of the United States. In 1856 a vessel called the Sitka, captured by the English from the Russians, entered the harbour of San Francisco with a prize crew and some Russian prisoners on board. Application being made to the Californian courts on behalf of the latter a writ of habeas corpus was issued, upon service of which the Sitka set sail without obeying its order. The government of the United States being doubtful whether a cause of complaint had arisen against England, referred the question to their Attorney-General, who advised that the courts of the United States, have 'adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign. . . . The ship' which the captain of the Sitka 'commanded was a part of the territory of his country; it was threatened with invasion from the local courts; and perhaps it was not only lawful, but highly discreet, in him to depart and avoid unprofitable controversy[1].' Turning to England, it is no doubt true that under the Customs Acts foreign ships of war are liable to be searched, and that it has been the practice to surrender slaves who have taken refuge on board English war-vessels lying in the waters of the states where slavery exists

[1] Wheaton, Elem. pt. ii. ch. ii. § 9; Halleck, i. 176; Woolsey, § 58 and 68; Report of Commission on Fugitive Slaves, p. xl.

under sanction of the territorial law; but, on the other hand, political refugees have often been received on board British men of war, the Admiralty Instructions inform officers in command that 'during political disturbances or popular tumults refuge may be afforded to persons flying from immediate personal danger,' and in a letter, written by order of Lord Palmerston in 1849 with reference to the occurrences then taking place in Naples and Sicily, it is stated that 'it would not be right to receive and harbour on board a British ship of war any person flying from justice on a criminal charge, or who was escaping from the sentence of a court of law; but a British ship of war has always and everywhere been considered as a safe place of refuge for persons of whatever country or party who have sought shelter under the British flag from persecution on account of their political conduct or opinions.' As persons who are in danger of their life because of their political acts are usually looked upon as criminals by the successful party in the state, the distinction here drawn is clearly one of mere propriety. In law, the right of asylum is upheld. Again, the most recent instructions with regard to slaves assert theoretically the right of granting asylum, and leave a very wide discretion to commanding officers as to its exercise. Finally, so far as England is concerned, Sir R. Phillimore, Sir Travers Twiss, Sir W. Harcourt, and Mr. Bernard are agreed in holding that the laws of a state cannot be forcibly executed on board a foreign vessel of war lying in its waters unless by the order or permission of the commanding officer[1].

There not being indications that opinion has varied in other countries to the same extent as in England and the United

[1] 16 and 17 Vict. c. 107, sect. 52; Mundy's H.M.S. *Hannibal* at Palermo, p. 76; Opinion of Sir R. Phillimore and Mr. Bernard, Rep. of Fugitive Slave Commission, p. xxvi; Letter of Historicus to the *Times* of Nov. 4, 1875, quoted ib. p. lxii; Law Magazine and Review, No. ccxix. The majority of the Fugitive Slave Commission appear to have adopted views which would reduce the immunities of vessels of war to a shadow; but in the special matter of International Law their authority cannot be regarded as equal to that of the four jurists above mentioned.

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States, the views at present entertained on the continent of Europe may be dismissed more quickly. In France the territoriality of a vessel of war is distinctly asserted by most writers, and the practice of the courts with regard to mercantile ships raises a strong presumption that public vessels would be considered by them to possess immunity in the highest degree[1]. In Germany and Italy it appears, from information given by the governments of those countries to the English Commission on Fugitive Slaves, that a ship of war is regarded as part of the national territory, and by the latter state it is expressly declared that 'a slave who might take refuge on an Italian ship, considered by the government as a continuance of the national territory, whether on the high seas or in territorial waters, must be considered as perfectly free.' The works of MM. Heffter and Bluntschli show that the jurists of Germany are in agreement with their government. That the doctrine accepted in Spain is similar may be inferred from its occurrence in the text-book which is used by royal order in the naval academies[2].

Immunities of public vessels.

From what has been said it is clear that there is now a great preponderance of authority in favour of the view that a vessel of war in foreign waters is to be regarded as not subject to the

[1] Ortolan, who was himself a naval officer, says 'la coutume internationale est constante; ces navires restent régis uniquement par la souveraineté de leur pays; les lois, les autorités et les juridictions de l'état dans les eaux duquel ils sont mouillés leur restent étrangères; ils n'ont avec cet état que des relations internationales, par la voie des fonctionnaires de la localité compétents pour de pareilles relations' (Dip. de la Mer, liv. ii. ch. x). Fœlix, liv. ii. tit. ix. ch. i. § 544, in effect says that a vessel of war remains 'a continuation of the territory' when in foreign waters. See also Hautefeuille, tit. vi. ch. i. sect. 1.

[2] Report of the Fugitive Slave Commission, p. viii. Heffter, § 79, dismisses the subject in a few words, but the scope of his views may be judged from his references; Bluntschli, § 321—this section must be read by the light of the previous sections on exterritoriality; Negrin, Tratado de Derecho Internacional Maritimo, tit. i. cap. iv. See also Riquelme, i. 228. Fiore (§§ 532-9) in some respects reduces the privileges of a man of war below the point at which they are supposed to stand by the majority of the Fugitive Slave Commission. He would give a right, in certain circumstances, of arresting the officer commanding on his own quarterdeck.

territorial jurisdiction. This being the case the law may probably be stated as follows:— PART II CHAP. IV

A vessel of war, or other public vessel of the state, when in foreign waters is exempt from the territorial jurisdiction; but her crew and other persons on board of her cannot ignore the laws of the country in which she is lying, as if she constituted a territorial enclave. On the contrary, those laws must as a general rule be respected. Exceptions to this obligation exist, in the case of acts beginning and ending on board the ship and taking no effect externally to her, firstly in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively touched[1], and secondly to the extent that any special custom derogating from the territorial law may have been established,—perhaps also in so far as the territorial law is contrary to what may be called the public policy of the civilised world. In the case of acts done on board the vessel, which take effect externally to her, the range of exception is narrower. The territorial law, including administrative rules, such as quarantine regulations and rules of the port, must be respected, to the exception, it is probable, of instances only in which there is a special custom to the contrary. When persons on board a vessel protected by the immunity under consideration fail to respect the territorial law within proper limits the aggrieved state must as a rule apply for redress to the government of the country to which the vessel belongs,—all ordinary remedies for, or restraints upon, the commission by persons so protected of wrongful acts affecting the territory of a state being forbidden. In extreme cases, however, as where the peace of a country is seriously threatened or its sovereignty is infringed, measures may be taken against the ship itself, analogous to those which in like circumstances may be taken against a sovereign; it may be summarily

[1] The case, which however would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow-subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal.

ordered out of the territory, and it may if necessary be forcibly expelled.

Thus—to illustrate some of the foregoing doctrines—under the general rule of respect for the laws of a state it is wrong for a ship to harbour a criminal or a person charged with non-political crimes. If, however, such a person succeeds in getting on board, and is afforded refuge, he cannot be taken out of the vessel. No entry can be made upon her for any purpose whatever. His surrender, which is required by due respect for the territorial law, must be obtained diplomatically. In like manner, if an offence is committed on board which takes effect externally, and the captain refuses to make reparation—if, for example, he were to refuse to give up or to punish a person who while within the vessel had shot another person outside,—application for redress must be made to the government to which the ship belongs. If, on the other hand, the captain of a vessel were to allow political refugees to maintain communication with the shore and to make the ship a focus of intrigue, or if he were to send a party of marines to arrest a deserter, an extreme case would arise, in which the imminence of danger in the one instance, and in the other the disregard of the sovereign rights of the state, would justify the exceptional measure of expulsion. The case is again different if a political refugee is granted simple hospitality. The right to protect him has been acquired by custom. He ought not to be sought out or invited, but if he appears at the side of the ship and asks admittance he need not be turned away, and so long as he is innoxious the territorial government has no right either to demand his surrender or to expel the ship on account of his reception[1]. It is a more delicate matter to indicate cases in

[1] Something more may be permitted, or may even be due, in the case of the chiefs, or of prominent members, of a government overturned by revolution. They retain a certain odour of legitimacy. In 1848 the admiral commanding the British Mediterranean squadron detached a vessel to take the Pope on board in case the refuge were needed; and in 1862, on the outbreak of revolution in Greece, a British frigate escorted a Greek man of

which the local law may be disregarded on the ground of its repugnance to the public policy of the civilised world. It may indeed be doubtful whether any municipal law now existing in civilised or semi-civilised states has been so settled to be repugnant to public policy that a fair right to disregard it has arisen. It can only be said that it may be open to argument whether the reception of slaves might not be so justified.

When acts are done on board a ship which take effect outside it, and which if done on board an unprivileged vessel would give a right of action in the civil tribunals, proceedings in the form of a suit may perhaps be taken, provided that the court is able and willing to sit as a mere court of enquiry, and provided consequently that no attempt is made to enforce the judgment. In at least one case the British Admiralty has paid damages awarded by a foreign court against the captain of a ship of war in respect of a collision between his vessel and a merchant vessel in the port. It must, however, be clearly understood that the judgment of the court can have no operative force; the proceedings taken can only be a means of establishing the facts which have occurred; and the judgment given can only be used in support of a claim diplomatically urged when its justice is not voluntarily recognised by the foreign government[1].

war, with the King and Queen on board, out of Greek waters and received them so soon as some slight danger of mutiny appeared. [In September, 1898, Kang-yu-Wei the Chinese Reformer, who had escaped from Tien-tsin in a steamer belonging to Messrs. Jardine Mathieson, was placed on board a P. and O. at Wu-Sung and thence escorted to Hong-Kong by H. M. S. *Bonaventure*.]

[1] As the language of Lord Stowell in the case of the Prinz Frederik (ii Dodson, 484) suggests that under his guidance the English Courts might have asserted jurisdiction over a ship of war, to which salvage services have been rendered, for remuneration in respect of such services, and as, in 1873, Sir R. Phillimore, in the case of the Charkieh (L. R. iv Admiralty and Ecclesiastical cases, pp. 93, 96, expressed a strong doubt upon the point, and at any rate was 'disposed' to hold that 'within the ebb and flow of the sea the obligatio ex quasi contractu attaches jure gentium upon the ship to which the service has been rendered,' it may be worth while to notice that in a more recent case the latter judge decided that proceedings for salvage could not be taken against a foreign public vessel. In January, 1879, the United States frigate Constitution, laden with machinery which was

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The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew she is merely property; if members of her crew go outside the ship or her tenders or boats they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his state. Possessing his ship, in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily he may fairly be expected to take the consequences of his act.

Immunities of military forces.

Military forces enter the territory of a state in amity with that to which they belong, either when crossing to and fro between the main part of their country and an isolated piece of it, or as allies passing through for the purposes of a campaign, or furnishing garrisons for protection. In cases of the former kind, the passage of soldiers being frequent, it is usual to conclude conventions, specifying the line of road to be followed by them, and regulating their transit so as to make it as little

being taken back to New York from the Paris Exhibition at the expense of the American government, went aground upon the English coast near Swanage. Assistance was rendered by a tug; and a disagreement having taken place between its owner and the agents of the American government as to the amount of the remuneration to which the former was fairly entitled, application was made for a warrant to issue for the arrest of the Constitution and her cargo. The American government objected to the exercise of jurisdiction by the court; the objection was supported by counsel on behalf of the crown; and the application was refused on the ground that the vessel 'being a war frigate of the United States navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of this country.' The Constitution, L. R. iv P. D. 156. The principle upon which this case was decided does not conflict with that of the judgment in the case of the Newbattle (L. R. x P. D. 33), where a foreign government was itself the plaintiff. In this the principle of the King of Spain *v.* Hallet and Widder was simply reaffirmed. Cf. antea, p. 170 n.

onerous as possible to the population among whom they are. Under such conventions offences committed by soldiers against the inhabitants are dealt with by the military authorities of the state to which the former belong; and as their general object in other respects is simply regulatory of details, it is not necessary to look upon them as intended in any respect to modify the rights of jurisdiction possessed by the parties to them respectively[1]. There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evident that there would be some difficulty in carrying out any other arrangement[2].

[1] See for example the Etappen Convention between Prussia and Hanover in 1816, or that between Prussia and Brunswick in 1835 (De Martens, Nouv. Rec. iv. 321, and Nouv. Rec. Gén. vii. i. 60).

[2] Von Bar (Das Internationale Privat- und Strafrecht, § 145) thinks that 'Verbrechen und Vergehen welche von den fremden Soldaten gegen Cameraden und Vorgesetzte oder gegen die Heeresordnung oder gegen den eigenen Staat begangen werden, fallen vorzugsweise der inneren Disciplin anheim und sind, da die Disciplinargewalt einem fremden Heere, welchem man den Eintritt in das Staatsgebiet erlaubt, nothwendig zugestanden werden muss, lediglich den Strafgesetzen und Gerichten des Staats unterworfen, dem die Truppen angehören. Bei Verbrechen dagegen, welche entweder andere nicht zur fremden Armee gehörige Personen oder die öffentliche Ruhe gefährden, kann die Strafgewalt des Staats, in dessen Gebiete die Truppen sich befinden, als ipso jure ausgeschlossen wohl nicht angesehen werden: es wird daher in Ermangelung eines besondern Vertrags die Prävention entscheiden.' Fiore (§§ 513–14) considers that within the lines of the army the jurisdiction of the country reigns to which the army belongs; but that any member of the force found outside its lines may be subjected to the local jurisdiction.

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Reasons for discarding the fiction of exterritoriality.

If the view that has been presented of the extent and nature of the immunities which have been hitherto discussed be correct, it is clear that the fiction of exterritoriality is not needed to explain them, and even that its use is inconvenient. It is not needed, because the immunities possessed by different persons and things can be accounted for by referring their origin to motives of simple convenience or necessity, and because there is a reasonable correspondence between their present extent and that which would be expected on the supposition of such an origin. The only immunities, in fact, upon the scope of which the fiction of exterritoriality has probably had much effect, are those of a vessel of war, which seem undoubtedly to owe some of the consolidation which they have received during the present century to its influence. The fiction is moreover inconvenient, because it gives a false notion of identity between immunities which are really distinct both in object and extent, and because no set of immunities fully corresponds with what is implied in the doctrine. Nothing in any case is gained by introducing the complexity of fiction when a practice can be sufficiently explained by simple reference to requirements of national life which have given rise to it; where the fiction fails even to correspond with usage, its adoption is indefensible.

Immunities of foreign public property other than public vessels of the state.

Besides public vessels of the state properly so called, other vessels employed in the public service, and property possessed by the state within foreign jurisdiction, are exempted from the operation of the local sovereignty to the extent, but to the extent only, that is required for the service of the state owning such vessels or property. Thus to take an illustration from a case which, though municipal, was decided on the analogy of international law; a lien cannot be enforced upon a light ship, built for a state in a foreign country. It must be allowed to issue from the territory without impediment. But there its privileges end. Unlike a ship of war its efficiency is not interfered with by the exercise of local jurisdiction over the crew. The mercantile crew which navigates it can be replaced,

if necessary; and there is no reason why, if a crime is committed on board which interests the local authority, entry should not be made and the criminal apprehended, as in the case of an ordinary merchant ship. Practically immunity to this extent amounts to a complete immunity of property, whenever no question of jurisdiction over persons arises. If in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state[1].

Merchant vessels in the ports of a foreign state.

Merchant vessels lying in the ports of a foreign state enjoy a varying amount of immunity from the local jurisdiction by the practice of most, and perhaps of all, states, and there are some writers who pretend that the practice has been incorporated into international law. The notion that merchant vessels have a right to immunity is closely connected with the doctrine, which with reference to them will be discussed in a later chapter, that ships are floating portions of the country upon which they depend; and perhaps apart from this doctrine it would not have acquired the influence which it possesses; but the two are not inseparable, and so far as appears from a judgment of the Court of Cassation, which settled the French law upon the subject, the practice in France, where attention was probably first drawn to the matter, did not originally found itself on the doctrine. It may therefore be considered independently, and it will not lose by dissociation from an inadmissible fiction.

[1] Briggs v. Light Boats, xi Allen, 157. In England, the Courts have refused to allow the seizure by state creditors of bonds and moneys in London belonging to the Queen of Portugal as sovereign (De Haber v. the Queen of Portugal, xx Law Journal, Q. B. 488), and to order shells bought by the Mikado of Japan in Germany to be destroyed, because of an infringement of an English patent, on coming within English jurisdiction (Vavasseur v. Krupp, L. R. ix Ch. D. 351).

A claim of immunity for goods sent to an industrial exhibition has recently been made on two occasions in the French Courts, and has been refused by them. It is scarcely necessary to say that the claim is wholly destitute of foundation. It is not worth while to state the arguments in support of it; they can be found reported in Calvo, § 628.

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According to the view held by the writers in question, the crew of a merchant ship lying in a foreign port is unlike a collection of isolated strangers travelling in the country; it is an organised body of men, governed internally in conformity with the laws of their state, enrolled under its control, and subordinated to an officer who is recognised by the public authority; although therefore the vessel which they occupy is not altogether a public vessel, yet it carries about a sort of atmosphere of the national government which still surrounds it when in the waters of another state[1]. Taking this view,

[1] Like views were urged by Mr. Webster in the correspondence on the Creole case. 'The rule of law,' he says, 'and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbour, possesses its jurisdiction and its laws. . . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider, or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must doubtless be answerable to the laws of the place. Nor if the master and crew while on beard in such port break the peace of the community by the commission of crimes can exemption be claimed for them. But nevertheless the law of nations as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations in modern times do clearly hold that the jurisdiction and laws of a nation accompany her ships, not only over the high seas, but into ports and harbours, or wheresoever else they may be water borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof; and that to the extent of the exercise of this jurisdiction they are considered as parts of the territory of the nation itself.' He went on to argue that slaves, so long as they remained on board an American vessel in English waters, did not fall under the operation of English law. Mr. Webster to Lord Ashburton, Aug. 1, 1842, State Papers, 1843, lxi. 35. Mr. Webster would have been embarrassed if he had been compelled to prove the legal value of all that he above states to be law by reference to sufficient authority. The amount of authority which could be adduced in favour of his doctrine at that time was distinctly less than that by which it is now supported.

Wheaton, though not originally in favour of these views, is said to have subsequently adopted them [Elements, 3rd English edition, p. 151]; they are apparently thought by Halleck (i. 191) to be authoritative, and are broadly laid down as being so by Negrin (104). Massé (Droit Commercial, § 527) and Calvo (§§ 1110–11 and 1121) approve of the practice without seeming to

the French government and courts have concluded that 'there is a distinction between acts relating solely to the internal discipline of the vessel, or even crimes and lesser offences committed by one of the crew against another, when the peace of the port is not affected, on the one hand; and on the other, crimes or lesser offences committed upon or by persons not belonging to the crew, or even by members of it upon each other, provided in the latter case that the peace of the port is compromised.' In two instances it has been held by the superior courts that in cases of the former kind the local authorities have not jurisdiction, and in another, the court of Rennes having some doubt as to the applicability of the principle upon which the earlier cases were decided, the government, on being consulted, directed that the offender should be given into the custody of the authorities on board his own ship[1].

Many states profess to follow the example of France in their own ports; and in a considerable number of recent consular conventions it is stipulated that consuls shall have exclusive charge of the purely internal order of the merchant vessels of their nation, and that the local authorities shall only have a right of interference when either the peace or public order of the port or its neighbourhood is disturbed, or when persons other than the officers and crew of a ship are mixed up in the breach of order which is committed[2]. Practice however, even in France, is by no means consistent, and consular conventions seem occasionally to be subjected to very elastic interpretation. When the second mate of an American vessel lying in the port

regard it as strictly authoritative. It is difficult to combine Bluntschli's 320th with his 319th section. Heffter (§ 79), Twiss (i. § 159), and Phillimore (i. § cccxlviii) simply state the existing law.

[1] Ortolan, Dip. de la Mer, liv. ii. ch. x. and xiii, and Append., Annexe J.

[2] In the treaties of commerce between the United States and the Two Sicilies in 1855 (Nouv. Rec. Gén. xvi. i. 521) and between the Zollverein and Mexico in the same year (ib. xvi. ii. 265), and in some consular conventions, e.g. between Bolivia and Venezuela in 1883 (Nouv. Rec. Gén. 2e sér. xv. 762), consuls are given power to judge differences arising between masters and crews of vessels of their state 'as arbitrators.'

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of Havre killed one sailor and wounded another, the Cour de Cassation delivered a judgment which in effect asserted that merchant vessels were fully under the local jurisdiction whenever the state saw fit to exercise it; and in the United States the Supreme Court has held that a local court rightly took cognizance of a case, in which one man was stabbed by another during an affray that occurred between decks on a Belgian vessel and was unknown outside, notwithstanding that a consular convention existed between Belgium and the United States under which the local authorities were forbidden to interfere except where disorder arose of such nature as to disturb tranquillity or public order on shore or in the port[1].

To whatever extent the view that merchant ships possess an immunity from the local jurisdiction is in course of imposing itself upon the conduct of states, it cannot as yet claim to be of compulsory international authority. It is far from being supported by the long continuance and generality of usage which, in the absence of consent, are needed to give legal value to a doctrine derogating from so fundamental a principle as is that of sovereignty. At the same time the numerous conventions, and the voluntary abstention from the exercise of jurisdiction which everywhere more or less prevails, point towards the proximate formation of a uniform custom which would be reasonable in the abstract, and singularly little open to practical objections.

Passing vessels.

There is the more reason for acceding to what may be called the French opinion as to the limits within which local jurisdiction over vessels lying in the ports of a country ought to be put in force, that its adoption would render the measure of jurisdiction in their case identical with that which must ultimately be agreed

[1] Case of the Tempest, Dalloz, Jurisprudence Générale, Année 1859, p. 92; Wildenhus' Case, U. S. Reps. cxx, p. 1.

The practice of the Courts of the United States, apart from consular conventions, seems to be to take cognizance of all cases except those involving acts of mere interior discipline of the vessel. Wharton, Digest, § 35 a.

upon as applicable to merchant vessels passing through territorial waters in the course of a voyage.

The position in which the latter ought to be placed has hitherto been little attended to, and few cases have arisen tending to define it; but with the constantly increasing traffic of ships questions are more and more likely to present themselves, and it would be convenient that the broad and obvious line of conduct which is marked out by the circumstances of the case should be followed by all nations in common. It would also be convenient that the amount of jurisdiction to be exercised by a state in its ports and in its territorial waters in general should be made the same under a practice or understanding sufficiently wide to become authoritative. There is no reason for any distinction between the immunities of a ship in the act of using its right of innocent passage, and of a ship at rest in the harbours of the state; and if there were any reason, it would still be difficult to settle the point at which a distinction should be made. Suppose, for example, a difference to be established between the extent of the jurisdiction to which a passing vessel and a vessel remaining within the territory, or entering a port, is subjected; is a vessel which from stress of weather casts anchor for a few hours in a bay within the legal limits of a port, though perhaps twenty miles from the actual harbour, to be brought within the fuller jurisdiction; and if not, in what is entering a port to consist?

Limits within which the territorial jurisdiction ought to be exercised over them.

Looking at the case of passing vessels by itself, there being at present no clear usage in the matter, a state must be held to preserve territorial jurisdiction, in so far as it may choose to exercise it, over the ships and the persons on board, as fully as over ships and persons within other parts of its territory[1]. At

[1] Casaregis, De Commercio, disc. 136. 1; Wolff, Jus Gent. cap. i. § 131; Lampredi, Pub. Jur. Theorem. pt. iii. cap. ii. § ix. 8; Wheaton, Elem. pt. ii. ch. iv. § 6; Heffter, § 75. Much learning on the subject of the sovereignty of a state over non-territorial waters, in its bearing on passing vessels, is to be found in the judgment in Reg. v. Keyn—Franconia Case—(L. R.

the same time it is evident that the interests of the state are confined to acts taking effect outside the ship. The state is interested in preventing its shore fisheries from being poached, in repressing smuggling, and in being able to punish reckless conduct endangering the lives of persons on shore, negligent navigation by which the death of persons in other ships or boats may have been caused, and crimes of violence committed by persons on board upon others outside; and not only is it interested in such cases, not only may it reasonably be unwilling to trust to justice being done with respect to them by another state, it is also more favourably placed for arriving at the truth when they occur, and consequently for administering justice, than the country to which the vessel belongs can be. On the other hand, the state is both indifferent to, and unfavourably placed for learning, what happens among a knot of foreigners so passing through her territory as not to come in contact with the population. To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so [1], is of advantage to no one.

It seems then reasonable to conclude that states, besides exercising such jurisdiction as is necessary for their safety and for the fulfilment of their international duties, ought to reserve to themselves such ordinary jurisdiction as is necessary to maintain customs and other public regulations within their territorial waters, and to provide, both administratively and by way of

ii Exchequer Div. 63); but the case was decided adversely to the jurisdiction of the state upon grounds of municipal and not of international law. The statute 41 and 42 Vict. c. 73 (the Territorial Waters Jurisdiction Act, 1878), has since been enacted, which asserts sovereignty over British territorial waters, by conferring upon the Court of Queen's Bench, &c., jurisdiction in respect of acts done within a marine league of the shore, subject to the proviso that such jurisdiction shall only be exercised in England with the consent of a secretary of state, and in a Colony with the consent of the governor.

[1] Of course in the case of infectious disease the mere anchorage of a vessel in places where there is a risk of the disease spreading may be prevented, although nothing has been done, and nothing has occurred, actually producing effect beyond the vessel.

civil and criminal justice, for the safety of persons and property upon them and the adjacent coasts[1].

Freedom of a vessel entering a state from its jurisdiction in respect of acts done outside it by or upon its subjects.

A merchant vessel while on non-territorial waters being subject, as will be seen later[2], to the sovereignty of that country only to which she belongs, all acts done on board her while on such waters are cognizable primarily by the courts of her own state, unless they be acts of piracy[3]. The effects of this rule extend, as indeed is reasonable, to cases in which, after a crime has been committed by or upon a native of a country other than that to which the ship belongs, she enters a port of that state with the criminal on board. The territorial authorities will not interfere with his being kept in custody on board, nor with his being transferred to another vessel for conveyance to a place within the local jurisdiction of the sovereign to which the ship belongs[4].

How far a state can compel foreigners to help in maintaining the public safety.

The broad rule has already been mentioned that as an alien has not the privileges, so on the other hand he has not the responsibilities, attached to membership of the foreign political society in the territory of which he may happen to be. In return however for the protection which he receives, and the opportunities of profit or pleasure which he enjoys, he is liable

[1] The Institut de Droit International in 1894 expressed the view that 'Les crimes et délits commis à bord de navires étrangers de passage dans la mer territoriale par des personnes qui se trouvent à bord de ces navires, sur des personnes ou des choses à bord de ces mêmes navires, sont, comme tels, en dehors de la juridiction de l'état riverain, à moins qu'ils n'impliquent une violation des droits ou des intérêts de l'état riverain, ou de ses ressortissants ne faisant partie ni de l'équipage ni des passagers.'

[2] See postea, p. 253.

[3] See postea, p. 257.

[4] Ortolan, Dip. de la Mer, liv. ii. ch. viii; Twiss, i. 230. Some countries, e. g. the United States, maintain that the competent tribunals of the nation to which a vessel belongs have exclusive jurisdiction in respect of crimes committed on board her upon the high seas. Theoretically, however, a state has the right to attach whatever consequences it chooses, within its own territory, to acts of its subjects, wherever those acts may be done; and practically the maintenance of a right to more or less of concurrent jurisdiction offers in some cases the means of dealing with crime which might otherwise remain unpunished. Cf. postea, p. 255 n.; also Hall's Foreign Jurisdiction of the British Crown, p. 81 n., and p. 241, n. 2.

to a certain extent, at any rate in moments of emergency, to contribute by his personal service to the maintenance of order in the state from which he is deriving advantage, and in some circumstances it may even be permissible to require him to help in protecting it against external dangers.

During the civil war in the United States the British government showed itself willing that foreign countries should assume to themselves a very liberal measure of rights in this direction over its subjects. Lord Lyons was instructed 'that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the Militia or Police of the country or to contribute to the support of such establishments;' and though objection was afterwards taken to English subjects being compelled 'to serve in the armies in a civil war, where besides the ordinary incidents of battle they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern,' it was at the same time said that the government 'might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicil, including, when imposed by the municipal law of such country, service in the Militia or National Guard, or Local Police, for the maintenance of internal peace and order, or even, to a limited extent, for the defence of the territory from foreign invasion[1].' The case of persons domiciled or at least temporarily settled in the country seems to have been the only one contemplated in these instructions, and it is not probable that the English government would have regarded persons, who could not be called residents in any sense of the word, as being affected by such extended liabilities. But whether the latter was the case or not, and whether if it were so, there is any sufficient reason for making a distinction between residents and sojourners, the concession made to local authority seems unnecessarily large. If it be once admitted

[1] Naturalisation Commission, Append. to the Report, 42.

that aliens may be enrolled in a militia independently of their own consent, or that they may be used for the defence of the territory from invasion by a civilised power, it becomes impossible to have any security that their lives will not be sacrificed in internal disturbances producing the effects pointed out by Lord Russell as objectionable, or in quarrels with other states for the sake of interests which may even be at variance with those of their own country. It is more reasonable, and more in accordance with general principle, to say, as is in effect said by M. Bluntschli[1], that—

1. It is not permissible to enrol aliens, except with their own consent, in a force intended to be used for ordinary national or political objects.

2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.

3. They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilised nations[2].

[1] Le Droit International codifié, § 391.

[2] In some treaties the compulsory enrolment of foreign subjects in state forces liable to be used for other than police purposes is expressly guarded against. In the majority of recent commercial treaties the subjects of each of the contracting states are exempted from service in the army, militia, or national guard of the other party to the treaty. In the treaty of 1855 between the Zollverein and Mexico (Nouv. Rec. Gén. xvi. ii. 257) exemption of their respective subjects from forced military service is stipulated, 'mas no del de policia en los casos, en que para seguridad de las propriedades y personas fuere necesario su auxilio, y por solo el tiempo di esa urgente necesidad.' In some cases exemption from military service only is stipulated, perhaps leaving open the question of the extent to which foreigners may be used in case of internal disturbance.

[In May, 1894, the now defunct South African Republic made war against Malaboch, the paramount chief in Zoutspanberg. By no stretch of the imagination could it be contended that a savage invasion was threatened, but the Transvaal government forcibly 'commandeered' some twenty British subjects to join the local forces, and placed five others under arrest for refusing to serve, eventually sending them compulsorily to the front. This

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Crimes committed by foreigners in territory foreign to the state exercising jurisdiction.

The municipal law of the larger number of European countries enables the tribunals of the state to take cognizance of crimes committed by foreigners in foreign jurisdiction. Sometimes their competence is limited to cases in which the crime has been directed against the safety or high prerogatives of the state inflicting punishment, but it is sometimes extended over a greater or less number of crimes directed against individuals. In France foreigners are punished who, when in another country, have rendered themselves guilty of offences against the safety of the French state, of counterfeiting the state seal or coin having actual currency, and of forgery of paper money; they cannot however be proceeded against *par contumace*. In Belgium the law is identical; in Spain and Switzerland it is the same in principle, but differs somewhat in the list of punishable offences[1]. Greece includes offences committed abroad against Greek subjects. In Germany the tribunals take cognizance of all acts committed abroad by foreigners which would constitute high treason if done by subjects of the German state, as well as of coining, of forging bank notes and other state obligations, and of uttering false coin and notes or other instruments the forging of which brings the foreigner under the jurisdiction of the German courts. In Austria the tribunals can take cognizance of all crimes committed by foreigners in another state, provided that, except in the case of like crimes to those punishable by French law, an offer has

conduct was defended on the ground that British subjects were not exempt by treaty from military service—an exemption possessed by Germany, France, and other nations. Sir Henry Loch, the High Commissioner, does not seem to have been instructed to demand the release of the pressed men as of right; and though his negotiations with President Kruger resulted in an agreement not to 'commandeer' any more British subjects, the latter refused to ratify a draft convention by which Great Britain should be placed on an equality with other nations as regards exemption from military service. The abnormal relations then subsisting between the Transvaal Republic and this country are sufficient to deprive this incident of any value as a precedent.]

[1] [For the provisions of the draft Swiss penal code in this respect, see Rev. de Droit Int. 1897, vol. xxix. p. 33. The code still remains in suspended animation as an 'avant-projet.']

been first made to surrender the accused person to the state in which the crime has been committed, and has been refused by it. As the refusal of an offer to surrender is the equivalent of consent to the trial of a prisoner by the state making the offer, when a municipal law providing for his punishment exists there, the jurisdiction afterwards exercised does not take the form of a jurisdiction exercised as of right; the claim therefore to punish as of right is only made in the case of crimes against the safety or high prerogatives of the state. Under the new Italian penal code, foreigners are subjected to punishment for acts done outside Italy of the same nature as those punishable under the French code, provided that the penalty which can be inflicted amounts to imprisonment for more than five years; and it is also possible to proceed against a foreigner for such offences committed outside Italian jurisdiction to the prejudice of Italians as can be punished with imprisonment of not less than three years, as well as for certain offences directed against foreigners, provided that extradition shall have been offered to, and refused by, the government of the state within which the act has been done. In the Netherlands the list of punishable crimes, besides those contemplated by French law, includes murder, arson, burglary, and forgery of bills of exchange. In Sweden and Norway proceedings may be taken against any person accused of a crime against the state, or Norwegian subjects, or foreigners on board Norwegian vessels, if the king orders the prosecution. Finally, in Russia foreigners can be punished for taking part in plots against the existing government, the emperor, or the imperial family, and for acts directed against 'the rights of person or property of Russian subjects [1].'

[1] Fœlix, liv. ii. tit. ix. ch. iii; Strafgesetzbuch für das Deutsche Reich, einleitende Bestimmungen; Progetto del Codice Penale del Regno d'Italia, p. 263; Fiore, Délits commis à l'étranger, Rev. de Droit Int. xi. 302; Von Bar, § 138. Fœlix gives the older authorities for and against the validity of the laws in question, but without stating his own opinion. Dr. Woolsey (§ 76) says 'that states are far from universally admitting the territoriality of crime;' he adds that 'the principle' of its territoriality 'is not founded on reason, and that, as intercourse grows closer in the world, nations will

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Whether laws of this nature are good internationally; whether, in other words, they can be enforced adversely to a state which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. Putting aside the theory of the non-territoriality of crime as one which unquestionably is not at present accepted either universally or so generally as to be in a sense authoritative, it would seem that their theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive territorial jurisdiction of a state gives complete control over all foreigners, not protected by special immunities, while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other states as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support. It is at least as doubtful whether the voluntary concession of such a right would be expedient except under

more readily aid general justice.' The latter remark seems to connect him with De Martens (Précis, § 100), who, in conceding the power of criminal jurisdiction over foreigners in respect of acts done outside the state, contemplates its exercise rather by way of neighbourly duty, and in the interests of the foreign state, than as a privilege. Wheaton (Elem. pt. ii. § 19), with a truer appreciation of the nature of the practice, says that 'it cannot be reconciled with the principles of international justice.' See also Phillimore, i. § cccxxxiii. Massé (§ 524) defends the practice by urging that 's'il est vrai que les lois répressives reçues dans un état ne peuvent avoir d'autorité hors de cet état, cependant, lorsqu'un étranger s'est rendu coupable en pays étranger d'un crime qui viole les principes mêmes sur lesquels est fondée la société, qui porte atteinte aux personnes et aux propriétés, ne semble-t-il pas qu'en réprimant cet attentat et en punissant le coupable trouvé en France, les tribunaux ne feraient que remplir un devoir social qui rentre dans les limites de leur compétence naturelle?'

An exhaustive collection and an able examination of the facts and opinions connected with the subject will be found in Mr. Moore's Report on Extraterritorial Crime and the Cutting case, issued by the Department of State of the United States in 1887. The Report is made the basis of an article by M. Albéric Rolin in the Rev. de Droit Int. 1888, p. 559.

On the various theories held as to the ground of criminal jurisdiction, see also Wharton, On the Conflict of Laws, 2nd ed. §§ 809–13.

the safeguard of a treaty. In cases of ordinary crimes it would be useless, because the act would be punishable under the laws of the country where it was done, and it would only be necessary to surrender the criminal to the latter. It might, on the other hand, be dangerous where offences against the national safety are concerned. The category of such acts is a variable one; and many acts are ranked in it by some states, to the punishment of which other countries might with propriety refuse to lend their indirect aid, by allowing a state to assume to itself jurisdiction in excess of that possessed by it in strict law [1].

Rights of giving and refusing hospitality.

A state being at liberty to do whatever it chooses within its own territory, without reference to the wishes of other states, so long as its acts are not directly injurious to them, it has the right of receiving and giving hospitality or asylum to emigrants or refugees, whether or not the former have violated the laws of their country in leaving it, and whether the latter are accused of political or of ordinary crimes. So soon as an individual, not being at the moment in custody, asks to be permitted to enter

[1] In 1879 the Institut de Droit International resolved, by nineteen votes to seven, that 'tout état a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'état en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.' As thus restricted, the scope of the assumed right of punishing foreigners for acts done out of the jurisdiction of the state inflicting punishment, falls far below that of many of the municipal laws above mentioned. The assumption of the right might even be accounted for with considerable plausibility by the existence of the right of self-preservation. But precisely the class of acts remains subject to exceptional jurisdiction which there is most danger in abandoning to it. Probably as between civilised states political acts are the only acts, satisfying the above description, which would not be punishable by the law of the state where they are committed. The question presents itself therefore whether self-preservation is really involved to so serious an extent as to override the rights of sovereignty. It would be rash to say that it never is so deeply involved; but it is not rash to say that the occasions are rare, and that it is doubtful whether it would be possible to allow such exceptional crimes to be dealt with without in practice permitting ordinary political acts to be also struck at. Of course nothing that is here said militates against the propriety or advisability of concluding treaties directed to repress particular crimes.

the territory of a state, the state alone decides whether permission shall be given; and when he has been received the state is only bound, under its general responsibility for acts done within its jurisdiction, to take such precautions as may be necessary to prevent him from doing harm, by placing him for instance under surveillance or by interning him at a distance from the frontier, if there is reason to believe that his presence is causing serious danger to the country from which he has fled. On the failure of measures of this kind a right arises on the part of the threatened state to require his expulsion, so that it may be freed from danger; but in no circumstances can it exact his surrender.

How far a state ought to allow its right of granting asylum to be subordinated to the common interest which all societies have in the punishment of criminals, and with or without special agreement should yield them up to be dealt with by the laws of their country, has been already considered [1].

For the reason also that a state may do what it chooses within its own territory so long as its conduct is not actively injurious to other states, it must be granted that in strict law a country can refuse the hospitality of its soil to any, or to all, foreigners; but the exercise of the right is necessarily tempered by the facts of modern civilisation. For a state to exclude all foreigners would be to withdraw from the brotherhood of civilised peoples; to exclude any without reasonable or at least plausible cause is regarded as so vexatious and oppressive, that a government is thought to have the right of interfering in favour of its subjects in cases where sufficient cause does not in its judgment exist. The limits of the power of a state to exclude foreigners are thus plain enough theoretically, and up to a certain point they can be laid down fairly well for practical purposes. If a country decides that certain classes of foreigners are dangerous to its tranquillity, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons,

[1] See antea, p. 56.

its conduct affords no ground for complaint. Its fears may be idle; its legislation may be harsh; but its action is equal. The matter is different where for identical reasons individual foreigners, or whole classes of foreigners, who have already been admitted into the country, or who are resident there, are subjected to expulsion. In such cases the propriety of the conduct of the expelling government must be judged with reference to the circumstances of the moment[1].

Right of admitting foreigners to the status of subjects.

A state has necessarily the right in virtue of its territorial jurisdiction of conferring such privileges as it may choose to grant upon foreigners residing within it. It may therefore admit them to the status of subjects or citizens. But it is evident that the effects of such admission, in so far as they flow from the territorial rights of a state, make themselves felt only within the state territory. Outside places under the territorial jurisdiction of the state, they can only hold as long as they do not conflict with prior rights on the part of another state to the allegiance of the adopted subject or citizen. A state which has granted privileges to a stranger cannot insist upon his enjoyment of them, and cannot claim the obedience which is correlative to that enjoyment, outside its own jurisdiction as against another state, after the latter has shown that it had exclusive rights to the obedience of the person in question at the moment when he professed to contract to yield obedience to another government. If therefore the adoption of a foreigner into a state community

[1] M. Rolin Jaequemyns (Rev. de Droit Int. xx. 498) endeavours to formulate a scheme of restrictions upon the right of expulsion which might be conventionally accepted. It is to be feared that any scheme of the kind must, as a whole, be too general in its terms. One clause of his proposal however states with precision what ought to be the law: 'En l'absence d'un état de guerre,' he says 'l'expulsion en masse de tous les étrangers appartenant à une ou plusieurs nationalités déterminées ne se justifierait qu'à titre de représailles.' In 1888 the Institut de Droit International adopted a project of International Declaration of which the object was, while recognising the right of expulsion to the full, to temper its practical application (Annuaire de l'Institut, 1888–9, p. 245). It is to be feared that no government wishing to do a harsh act would find its hands much fettered by the Declaration.

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frees him from allegiance to his former state, he must owe his emancipation either to an agreement between nations that freedom from antecedent ties shall be the effect of naturalisation, or to the existence of a right on his part to cast off his allegiance at will. Whether, or to what extent, such an agreement or right exists will be discussed elsewhere. For the moment it is only necessary to point out that such power as a state may possess, of asserting rights with reference to an adopted subject in derogation of rights claimed by his original sovereign, is not consequent upon the right to adopt him into the state community[1].

Naturalisation by operation of law.

Whatever be the effect of giving to a foreigner the status of a subject or citizen with his own consent, a country has no right to impose the obligations of nationality, still less to insist that this foreign subject shall abandon in its favour his nationality of origin. Consent no doubt may be a matter of inference: and if the individual does acts of a political, or even, possibly, of a municipal nature, without inquiry whether the law regards the performance of such acts as an expression of desire on his part to identify himself with the state, he has no ground for complaint if his consent is inferred, and if he finds himself burdened upon the state territory with obligations correlative to the privileges which he has assumed. But apart from acts which can reasonably be supposed to indicate intention, his national character may with propriety be considered to remain unaltered. It is unquestionably not within the competence of a state to impose its nationality in virtue of mere residence, of marriage with a native, of the acquisition of landed property, and other such acts, which lie wholly within the range of the personal life, or which may be necessities of commercial or industrial business. The line of cleavage is distinct between the personal and the public life. Several South American states have unfortunately conceived themselves to be at liberty to

[1] See postea, p. 230.

force strangers within their embrace by laws giving operative effects to acts of a purely personal nature[1].

Responsibility of a state,

Primâ facie a state is of course responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected. To escape responsibility it must be able to show that its failure to prevent the commission of the acts in question, if not intended to be injurious, or its omission to do acts incumbent upon it, have been within the reasonable limits of error in practical matters, or if the acts or omissions have been intended to be injurious, that they could not have been prevented by the use of a watchfulness proportioned to the apparent nature of the circumstances, or by means at the disposal of a community well ordered to an average extent; or else it must be able to show that the injury resulting from the acts or omissions has been either accidental or independent of any act done within the territory which could have been prevented as being injurious.

The foregoing general principle requires to be applied with the help of certain considerations suggested by the facts of state existence.

in respect of acts done by 1. administrative, and naval and military agents,

Although theoretically a state is responsible indifferently for all acts or omissions taking place within its territory, it is evident that its real responsibility varies much with the persons concerned. Its administrative officials and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. Presumably therefore acts done by them are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them. Where consequently acts or omissions, which are productive of injury

[1] Nationality and Naturalisation, Parl. Papers, Miscell. No. 3 (1893) [No. 1 (1894), No. 1 (1895)]; Cogordan, La Nationalité, Annexes, 2e partie, O and H-H; Calvo, liv. viii, sect. 1.

in reasonable measure to a foreign state or its subjects, are committed by persons of the classes mentioned, their government is bound to disavow them, and to inflict punishment and give reparation when necessary.

2. judicial functionaries,

Judicial functionaries are less closely connected with the state. There are no well-regulated states in which the judiciary is not so independent of the executive that the latter has no immediate means of checking the acts of the former; judicial acts may be municipally right, as being according to law, although they may effect an international wrong; and even where they are flagrantly improper no power of punishment may exist. All therefore that can be expected of a government in the case of wrongs inflicted by the courts is that compensation shall be made, and if the wrong has been caused by an imperfection in the law of such kind as to prevent a foreigner from getting equal justice with a native of the country, that a recurrence of the wrong shall be prevented by legislation.

3. private persons.

With private persons the connexion of the state is still less close. It only concerns itself with their acts to the extent of the general control exercised over everything within its territories for the purpose of carrying out the common objects of government; and it can only therefore be held responsible for such of them as it may reasonably be expected to have knowledge of and to prevent. If the acts done are undisguisedly open or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them; if they are effectually concealed or if for sufficient reason the state has failed to repress them, it as obviously becomes responsible, by way of complicity after the act, if its government does not inflict punishment to the extent of its legal powers[1]. If however attempts are made to disguise

[1] In 1838 a body of men invaded Canada from the United States, after supplying themselves with artillery and other arms from a United States arsenal. Their proceedings were not of the nature of a surprise, and some of their preparations and acts of open hostility were carried on in the

the true character of noxious acts, what amount of care to obtain knowledge of them beforehand, and to prevent their occurrence, may reasonably be expected? And is the legal power actually

presence of a regiment of militia, which made no attempt to interfere (cf. postea, p. 270). In 1866, the Fenians in the United States held public meetings at which an intention of invading Canada was avowed, and made preparations which lasted for several months, uniformed bodies of men being even drilled openly in many of the large cities. For so long was an attack imminent that the Canadian government found itself compelled to call out 10,000 volunteers three months before the invasion was actually made. In the end of May the Fenians made an irruption into Canada without opposition from the authorities of the United States. On being driven back their arms were taken from them; and some of the leaders were arrested, a prosecution being commenced against them in the district court of Buffalo. Six weeks afterwards it was resolved by the House of Representatives that 'this House respectfully request the President to cause the prosecutions instituted in the United States Courts against the Fenians to be discontinued if compatible with the public interests,' and the prosecutions were accordingly abandoned. In October the arms taken from the Fenians were restored.

It would be difficult to find more typical instances of responsibility assumed by a state through the permission of open acts and of notorious acts, and by way of complicity after the acts. Of course in gross cases like these a right of immediate war accrues to the injured nation.

However little the United States are alive to their duties in respect of such acts as those described, they showed a disposition in 1879 to press state responsibility to the utmost possible extreme as against Great Britain. A body of Indians under Sitting Bull took refuge from United States troops in the then very remote and inaccessible British territory lying north of Montana. There was apparently reason to expect that they might make incursions into American territory. Mr. Grant in a despatch to Sir E. Thornton called 'the attention of Her Majesty's government to the gravity of the situation which may thus be produced,' and expressed 'a confident hope' that Great Britain would be 'prepared on the frontier with a sufficient force either to compel the surrender of the Indians to our forces as prisoners of war, or to disarm and disable them from further hostilities, and subject them to such constraint of surveillance and subjection as will preclude any further disturbance of peace on the frontier.' (Wharton, Digest, § 18.) In other words the country which had been guilty of direct complicity with raids on a friendly state from settled country close to the seat of government, did not hesitate when its own interests were involved to ask that state to undertake a distant and difficult expedition into wild and almost uninhabited regions.

The attitude assumed by the American government in 1891 with reference to the lynching of the Italians at New Orleans does not suggest that it is even yet willing to recognise as applying to itself, in the most rudimentary form, those duties the performance of which by others it expects in an exaggerated degree.

possessed by the government of a state the measure of the legal power which it can be expected to possess whether for purposes of prevention or of punishment?

Both these questions assumed considerable prominence during the proceedings of the tribunal of Arbitration at Geneva. With respect to the first it was urged by the United States that the 'diligence' which is due from one state to another is a diligence 'commensurate with the emergency or with the magnitude of the results of negligence.' Whether this doctrine represents the deliberate views of its authors, or whether it was merely put forward for the immediate purposes of argument, it is impossible to reprobate it too strongly. The true nature of an emergency is often only discovered when it has passed, and no one can say what results may not follow from the most trivial acts of negligence. To fail in preventing the escape of an interned subaltern might involve the loss of an empire. To make responsibility at a given moment depend upon an indeterminate something in the future is simply preposterous. The only measure of the responsibility arising out of a particular occurrence, which can be obtained from the occurrence itself, is supplied by its apparent nature and importance at the moment. If a government honestly gives so much care as may seem to an average intelligence to be proportioned to the state of things existing at the time, it does all it can be asked to do, and it cannot be saddled with responsibility for consequences of unexpected gravity. In no case moreover can it be reasonably asked in the first instance to use a care or to take means which it does not habitually employ in its own interests. In a great many cases of the prevention of injury to foreign states care signifies the putting in operation of means of inquiry, and subsequently of administrative and judicial powers, with which a government is invested primarily for internal purposes. If these agencies have been found strong enough for their primary objects a state cannot be held responsible because they have failed when applied to analogous

international uses, provided that the application is honestly made. Whether on the occurrence of such failure a case arises for an alteration of the law or for an improvement in administrative organisation is a matter which falls under the second question.

How far a state must provide itself with the means of preventing acts injurious to other states.

That a state must in a general sense provide itself with the means of fulfilling its international obligations is indisputable. If its laws are such that it is incapable of preventing armed bodies of men from collecting within it, and issuing from it to invade a neighbouring state, it must alter them. If its judiciary is so corrupt or prejudiced that serious and patent injustice is done frequently to foreigners, it ought to reform the courts, and in isolated cases it is responsible for the injustice done and must compensate the sufferers. On the other hand, it is impossible to maintain that a government must be provided with the most efficient means that can be devised for performing its international duties. A completely despotic government can make its will felt immediately for any purpose. It is better able than a less despotic government, and every government in so far as it is able to exercise arbitrary power is better able than one which must use every power in strict subordination to the law, to give prompt and full effect to its international obligations. It has never been pretended however that a state is bound to alter the form of polity under which it chooses to live in order to give the highest possible protection to the interests of foreign states. To do so would be to call upon it to sacrifice the greater to the less, and to disregard one of the primary rights of independence—the right, that is to say, of a community to regulate its life in its own way. All that can be asked is that the best provision for the fulfilment of international duties shall be made which is consistent with the character of the national institutions, it being of course understood that those institutions are such that the state can be described as well ordered to an average extent. A community has a right to choose between all forms of polity through which

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the ends of state existence can be attained, but it cannot avoid international responsibility on the plea of a deliberate preference for anarchy [1].

Although in a considerable number of cases questions have arisen out of conduct which has been, or which has been alleged to be, improper or inadequate as a fulfilment of the duties of a state in respect of its responsibility, it is not worth while to give examples here. It will be necessary in discussing the duties of neutrality to indicate for what acts, affecting the safety of a foreign country, a state may be held responsible, and what is there said may be taken as applicable to states in times of peace, subject only to the qualification that somewhat more forethought in the prevention of noxious acts should be shown during war, when their commission is not improbable, than during peace, when their commission may come by surprise upon the state within the territory of which they are done [2]. To give cases illustrating the circumstances under which a state is responsible for injuries or injustice suffered by foreign individuals would involve the statement of a mass of details disproportioned to the amount of information that could be afforded.

Effect of civil commotion upon responsibility.

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or

[1] The subject of the responsibility of a state is not usually discussed adequately in works upon international law. It is treated more or less completely, or portions of it are commented on, in Bluntschli, §§ 466–9 bis; Halleck, i. 397; Phillimore, i. § ccxviii, and Preface to 2nd ed. pp. xxi–ii; Reasons of Sir A. Cockburn for dissenting from the Award of the Tribunal of Arb. at Geneva, Parl. Papers, North Am. No. 2, 1873, pp. 31–8; Hansard, cci. 1123. M. Calvo in his third edition (§§ 357–8) and M. Fiore in his second edition (§§ 390–4 and §§ 646–64) go into the question much more fully than in the earlier editions of their respective works.

[2] See pt. iv. ch. iii.

through acts done by the part of the population which has broken loose from control. When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which from the nature of the case the government can have no control; and they cannot demand compensation for losses or injuries received, both because, unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state[1].

Foreigners must in the same way be prepared to take the consequences of international war.

[1] Bluntschli, § 380 bis. In the work of M. Calvo (§§ 292-5) the subject is dwelt upon with great detail.

During the American Civil War the British Government refused to procure compensation for injuries inflicted by the forces of the United States on the property of British subjects. The claimants were informed that they must have recourse to such remedies as were open to citizens of the United States,

CHAPTER V

SOVEREIGNTY IN RELATION TO THE SUBJECTS OF THE STATE

Nationality.

It follows from the independence of a state that it may grant or refuse the privileges of political membership, in so far as such privileges have reference to the status of the person invested with them within the country itself, and it may accept responsibility or facts done by any person elsewhere which affect other states or their subjects. Primarily therefore it is a question for municipal law to decide whether a given individual is to be considered a subject or citizen of a particular state. But the right to give protection to subjects abroad, and the continuance of obligation on the part of subjects towards their state notwithstanding absence from its jurisdiction, brings the question, under what circumstances a person shall or shall not be held to possess a given nationality, within the scope of international law. Hitherto nevertheless it has refrained, except upon one point, from laying down any principles, and still more from sanctioning specific usages in the matter. It declares that the quality of a subject must not be imposed upon certain persons with regard to whose position as members of another sovereign community it is considered that there is no room for the existence of doubt, the imposition of that quality upon an acknowledged foreigner being evidently inconsistent with a due recognition of the independence of the state to which he belongs; but where a difference of legal theory can exist international law has made no choice, and it is left open to states to act as they like.

Persons as to whose nationality

The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born

within a state territory of parents belonging to the community, and whose connexion with their state has not been severed through any act done by it or by themselves. To these may be added foundlings because, their father and mother being unknown, there is no state to which they can be attributed except that upon the territory of which they have been discovered.

1. no difference of opinion can exist;

The persons as to whose nationality a difference of legal theory is possible are children born of the subjects of one power within the territory of another, illegitimate children born of a foreign mother, foreign women who have married a subject of the state, and persons adopted into the state community by naturalisation, or losing their nationality by emigration, and the children of such persons born before naturalisation or loss of nationality.

2. difference of opinion can exist.

Under a custom, which was formerly so general as to be called by an eminent French authority 'the rule of Europe[1],' and of which traces still exist in the legislation of many countries, the nationality of children born of the subjects of one power within the territory of another was dictated by the place of their birth, in the eye at least of the state of which they were natives. The rule was the natural outcome of the intimate connexion in feudalism between the individual and the soil upon which he lived, but it survived the ideas with which it was originally connected, and probably until the establishment of the Code Napoléon by France no nation regarded the children of foreigners born upon its territory as aliens. In that Code however a principle was applied in favour of strangers, by which states had long been induced to guide themselves in dealing with their own subjects, owing to the inconvenience of looking upon the children of natives born abroad as foreigners. It was provided that a child should follow the nationality of his parents[2], and most civilised states,

Children born of the subjects of one power within the territory of another.

[1] Demolombe, Cours de Code Napoléon, liv. i. tit. i. chap. i. No. 146.

[2] The adoption of this principle was almost accidental. By the draft code it was proposed to be enacted, and the proposal was temporarily adopted,

either in remodelling their system of law upon the lines of the Code Napoléon, or by special laws, have since adopted the principle simply, or with modifications giving a power of choice to the child, or else, while keeping to the ancient rule in principle, have offered the means of avoiding its effects. In Germany, Austria, Hungary, Belgium, Denmark, Greece, Roumania, Servia, Sweden[1], Norway, Switzerland, Salvador, and Costa Rica national character follows parentage alone, and all these states claim the children of their subjects as being themselves subjects, wherever they may be born. The laws of Spain and Belgium, while regarding the child of an alien as an alien, give him the right, on attaining his majority, of electing to be a citizen of the country in which he resides. Russia makes nationality depend in principle on descent, but reserves a right of claiming Russian nationality to every one who has been born and educated on Russian territory. In all these cases the state regards as its subjects the children of subjects born abroad.

that 'tout individu né en France est Français.' It was urged against the article that a child might e. g. be born during the passage of its parents through France, and would follow them out of it. What would attach him to France? Not feudality, for it did not exist on the territory of the Republic; nor intention, because the child could have none; nor the fact of residence, because he would not remain. (Conférence du Code Civil, i. 36–52.) These reasonings seem to have prevailed. In any case the article was changed. But M. Demolombe points out that after all 'une sorte de transaction entre le système romain de la nationalité jure sanguinis et le système français de la nationalité jure soli' was effected by the provision which makes the naturalisation of the child of a foreigner born in France, who, during the year following the attainment of his majority, elects to be French, date back to the time of his birth. (Cours de Code Nap. liv. i. tit. i. chap. i. Nos. 146, 163.)

For the old law of France, see Pothier, Des Personnes et des Choses, partie i. tit. ii. sect. i; for that of England, Naturalisation Commission Report, Appendix. All 'children inheritors' born abroad were given the same benefits as like persons born in England by an Act of 25 Ed. III; but the children born abroad of all natural-born subjects were not reckoned as English subjects until after the statute of 7 Anne c. 5.

[1] [But under the Swedish law of Oct. 1894 the children of aliens who are born in Sweden become Swedish citizens on attaining the age of twenty-two if they have been domiciled in that country from birth without interruption. They can, however, avoid such naturalisation by proving that they possess civil rights in another country. Martens, N. R. G. 2me Sér. xx. 823.]

In Italy the law is so far tinged with the ancient principle, that while all children of aliens may elect to be Italian citizens, they are such as of course if the father has been domiciled in the kingdom for ten years, unless they declare their wish to be considered as strangers. In Europe, England and Portugal adhere in principle to the old rule; the child of an alien is English or Portuguese, but he may elect to recur to his nationality of parentage. In the Netherlands children of foreigners not domiciled in the kingdom are themselves foreigners; those that are born of domiciled parents are *primâ facie* Netherland subjects, but all claim to them is relinquished so soon as it is shown that, by the law of their country of origin, they remain foreign subjects. In France the law has been so modified by recent enactments that its only apparent principle seems to be supplied by a desire to ascribe French national character to as large a number of persons as possible[1]. In the United States it would seem that the children of foreigners in transient residence are not citizens, but that the

[1] The laws of June 26, 1889, and July 23, 1893, determine to be French:—

(1) Persons who, not having reached their majority before the former date, are children born in France to a foreign father not himself born in France, and who are domiciled there (the word 'domicile' being used 'dans le sens le plus large de résidence') at the time of attaining their majority according to French law. These persons may elect for their foreign nationality in the year following the attainment of their majority, but are regarded as French until the required formalities have been carried out, and may consequently be obliged to go through the usual service in the army.

(2) Persons who have been born in France at a later date than June 26, 1867, of a foreign parent not himself or herself born there, and who not being domiciled at the date of their majority, shall have applied before the age of twenty-two years to fix their domicile in France, and having fixed it accordingly, have claimed French nationality within a year of the date of application.

(3) Persons who have been born in France later than the above date of a foreign parent, whether father or mother, who has been born in France, except that if it be the mother who has been born in France, they shall be permitted, in the year following their majority, to declare for retention of their foreign nationality in the same manner as is prescribed for the first class of persons above mentioned. Parl. Papers, Miscell. Nos. 3 and 4, 1893; Rev. de Droit Int. Privé, xvii. 563; Trib. Civil de Bordeaux, 11 juillet 1892, ap. id. xix. 997.

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children of foreigners, who are in more prolonged residence, fall provisionally within the category of American citizens, though they lose their American character if they leave the United States during their minority [1]. The larger number of South American States regard as citizens all children of foreigners born within their territory. From the foregoing sketch of the various laws of nationality it may be concluded that the more important states recognise, with a very near approach to unanimity, that the child of a foreigner ought to be allowed to be himself a foreigner, unless he manifests a wish to assume or retain the nationality of the state in which he has been born. There can be no question that this principle corresponds better than any other with the needs of a time when a large floating population of aliens exists in most places, and when in every country many are to be found the permanence of whose establishment there depends upon the course taken by their private affairs from time to time. It is only to be wished that the rule in its simplest form were everywhere adopted [2].

Illegitimate children.

If children are illegitimate, their father being necessarily uncertain in law, the nationality of the mother is their only possible root of nationality where national character is derived from personal and not from local origin. Accordingly, it is almost everywhere the rule that they belong to the state of

[1] By the fourteenth amendment to the Constitution 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States'; and by section 1992 of the Revised Statutes 'all persons born in the United States and not subject to any foreign power are declared to be citizens of the United States.' It might be somewhat difficult to seize the intended effect of these provisions if it were necessary to interpret them without external assistanee. Happily an administrative gloss has been provided which seems—if I rightly understand it—to afford a very reasonable and convenient sense. Starting from the judicially ascertained circumstance that Indians are not citizens of the United States because they are not, in a full sense, 'subject to the jurisdiction' of the United States, it is considered that à fortiori the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians. Wharton's Digest, § 183.

[2] Naturalisation Com. Rep., Append.; Calvo, §§ 742–50; Bluntschli in Rev. de Droit International, ii. 107–9; 33 Vict. ch. 14.

which the mother is a subject[1]. English law forms an exception. By it illegitimate issue of Englishwomen abroad are considered to have the nationality of their place of birth, because it is by statute only that children born beyond the kingdom are admitted to the privilege of being English subjects, and no statute exists which applies to children produced out of wedlock. At the same time, as the old law of England imposing allegiance upon the issue of strangers in virtue of the soil has not been abrogated with respect to illegitimate children, the illegitimate children of foreign mothers, who have given birth to them in England, are considered to be English[2].

Married women.

Except in some American countries the nationality of a wife is merged in that of her husband, so that when a woman marries a foreigner she loses her own nationality and acquires his, and a subsequent change of nationality on his part carries with it as of course a like change on her side[3]. By the law of the United States a native woman marrying a foreigner perhaps remains a subject of her state, though an alien woman marrying an American citizen becomes herself naturalised[4]; by that of

[1] In Brazil, Ecuador, Guatemala, Paraguay, and Uruguay they acquire the nationality of the mother conditionally upon taking up residence or being domiciled in the territory. In Portugal they obtain nationality in this way or by declaration of choice.

[2] Bluntschli, § 366. It is sometimes provided, e. g. in France and Italy, that when a natural child is recognised by his father or mother in the former case, or by his father in the latter case, he follows the nationality of the parent recognising him. Art. 8 of the Law of 1889; Mazzoni, Ist. di diritto italiano, § 104. [In Sweden, under the law of 1894, illegitimate children whose parents marry while the former are still minors acquire the nationality of the father.]

[3] The wife of a French citizen, upon the acquisition of a new nationality by her husband, may however, if she chooses, retain the nationality possessed by him at the date of the marriage.

[4] American law on the subject is not quite clear; cf. Hall, Foreign Jurisd. of the British Crown, p. 41. Until 1870 the same rule held in England. It was altered by the Naturalisation Act of that year. The application of the principle of the merger of the nationality of the wife in that of the husband is sometimes carried to excess. By the French law, for example, if a Frenchman makes a bigamous marriage with a foreigner in a foreign country, the woman with whom he goes through the ceremony of marriage acquires a French nationality, it being held that 'elle est devenue Française

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Ecuador a native woman retains her nationality so long as she stays in the country; and in Venezuela and Haiti she keeps it in all circumstances.

Naturalisation.

It was observed in the last chapter that a state can only confer the quality of a citizen or subject in virtue of its sovereignty as within its own jurisdiction, and that the assertion of control, or the exercise of protection, over naturalised persons when outside its jurisdiction must be accounted for either by a general consent on the part of states that the acquisition of a new nationality shall extinguish a previously existing one, or by the recognition of a right in every individual to assume the nationality of any state which may choose to receive him. It will be seen by analysing practice, which so far from being uniform is greatly confused, that no general understanding on the matter has as yet been arrived at. With regard to the question whether a right of changing their nationality is possessed by individuals; as individuals have no place in international law, any such right as that indicated, if binding upon states, must be so through the possession of a right by the individual as against his state which is prior to and above those possessed by the state as against its members. Whether or not such a right exists international law is obviously not competent to decide. It could only have adopted the right from without as being one of which the public law of all states had admitted the existence; and the absence of uniform custom shows that public law has not so pronounced as to enable international law to act upon its dictates. International law must either maintain the principle of the permanence of original ties until they are broken with the consent of the state to which a person belongs who desires to be naturalised elsewhere, or it must recognise that the force of this principle has been destroyed by diversity of opinions and practice, and that each state is free to act as may seem best to it. There can be no doubt that the latter view

par le mariage, même frappé de nullité.' Sirey, Les Codes Annotés, ed. 1855, iii. 18.

is more in harmony with the facts of practice than the former. For the purposes of international law therefore the due relation of a naturalised person to the state which he has abandoned is outside the scope of accepted principle; it is a question of convenience only; and it is either to be settled by an individual state in accordance with its own interests, or by treaty between states for the common interests of the contracting parties.

Practice of states with regard to subjects naturalised abroad.

The practice of the more important states may be summarised as follows[1]:—

England.

That of England was based until 1870 upon the principles of the indelibility of natural allegiance and of liberty of emigration. Every one was free to leave his country; but whatever form he went through elsewhere, and whatever his intention to change his nationality, he still remained an Englishman in the eye of the law; wherever therefore English laws could run he had the privileges and was liable to the obligations imposed by them; if he returned to British territory he was not under the disabilities of an alien, and he was not entitled to the protection of his adopted country; if he was met with on the high seas in a foreign merchantman he could be taken out of it, the territoriality of such ships not being recognised by English law. On the other hand, so long as he stayed within foreign jurisdiction he was bound by his own professions; he had chosen to renounce his English character, and he could not demand the protection of the state towards which he acknowledged no duties. In the beginning of the present century this doctrine was rigidly enforced. Englishmen naturalised in the United States were impressed from on board American vessels for service in the English navy; and the government of the day entered upon the war of 1812 rather than mitigate the severity of its usages. In the peace which followed the treaties of Ghent and Vienna no occasion presented itself for giving effect upon the high seas

[1] The facts bearing on this subject are collected in the Appendix to the Report of the Royal Commission on the Laws of Naturalisation and Allegiance, 1869.

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to the doctrine maintained by Great Britain, and with the abandonment of impressment as a means of manning the navy the chief source of possible collision with other nations was removed; but successive English governments rejected the advances made by the United States for coming to a definite understanding on the question, and so late as 1842 Lord Ashburton, during his negotiations with Mr. Webster, put it aside as touching a principle which could not be subjected to discussion. In other applications the doctrine came more immediately within the scope of practice. In 1848, during the Irish disturbances of that year, an Irishman, naturalised in America, was arrested on suspicion of treason. Mr. Bancroft, the minister accredited by the United States to the Court of St. James, having remonstrated against the treatment of the arrested person as a subject of Great Britain, Lord Palmerston in his answer upheld the traditional view in precise and decided language. On a like occasion in 1866 Lord Clarendon declared that 'of course the point of allegiance could not be conceded.' But at both times proceedings were pushed as little as possible to extremes; the earliest opportunity was taken of setting arrested persons free on condition of their leaving the country; and the question was only twice fairly raised on applications by two naturalised persons for a mixed jury at their trial in 1867. Thus for more than half a century the assertion of the indelibility of allegiance was little else than nominal. It had become an anachronism, and its consistent practical assertion was impossible. In 1868 consequently a commission was appointed to report upon what alterations of the laws of naturalisation it might be expedient to make; and in 1870 an Act was passed providing that a British subject on becoming naturalised in a foreign state shall lose his British national character. Persons naturalised in a foreign state before the passing of the Act were permitted to make a declaration within two years stating their wish to remain subjects, in which case they were deemed to be such except within the state in which they were naturalised. The latter

qualification was little more than a formal sanction given to the practice which had already been followed. In 1858 it was stated by Lord Malmesbury, with reference to the children of British subjects born in the Argentine Confederation, who by the law of the Confederation were regarded as its subjects, that their quality of British subjects in England did not prevent them from being treated as subjects in the Confederation; and during the Civil War in the United States the English government refused to protect naturalised persons, their minor children although born in England, and persons who though not formally naturalised had exercised privileges reserved to citizens of the United States[1].

United States.

In the United States a certain confusion exists, the policy of the country having varied at different times, and the opinions entertained in the courts not being perfectly identical with those which have inspired political action. In the controversies which took place between the United States and England in the opening years of the century the government of the former country contended that it had a right to protect persons who had been received as citizens by naturalisation, notwithstanding that domestic regulations of their state might forbid renunciation of allegiance or might subject it to restrictions, and broadly declared 'expatriation' to be 'a natural right.' Mr. Justice Story, on the other hand, laid down 'the general doctrine' to be 'that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens;' Kent adhered to the same opinion; and in an exhaustive review

[1] Naturalisation Commission Report, Appendix, pp. 31-48; Naturalisation Act, 1870, 33 Vict. ch. 14. In consequence of claims for protection having been made by persons naturalised in England, it has been the practice since 1854 to insert a clause in naturalisation certificates excepting from the rights granted any 'rights and capacities of a natural-born British subject out of and beyond the dominions of the British crown, other than such as may be conferred on him by the grant of a passport from the Secretary of State to enable him to travel in foreign parts.' [The case of R. v. Lynch, L. R. (1903) 1 K. B. 444, decided the point which scarcely seemed to require judicial sanction that the Naturalisation Act does not empower a British subject to become naturalised in an enemy state during time of war.]

of the practice of the courts of the United States made by Mr. Cushing in 1856 it is remarked that on the 'many occasions when the question presented itself, not one of the judges of the Supreme Court has affirmed, while others have emphatically denied, the unlimited right of expatriation from the United States.' Of these inconsistent views the influence of the latter seems to have predominated during the greater part of the time which has elapsed since the war of 1812. In 1840 a Prussian naturalised in the United States, who had been required on returning to his country to undergo military service, and who had applied for protection to Mr. Wheaton, then American minister at Berlin, was informed by the latter that 'had you remained in the United States or visited any other foreign country except Prussia on your lawful business, you would have been protected by the American authorities at home and abroad in the enjoyment of all your rights and privileges as a naturalised citizen of the United States. But having returned to the country of your birth, your native domicil and natural character revert, so long as you remain in the Prussian dominions, and you are bound in all respects to obey the laws exactly as if you had never emigrated.' In several subsequent cases of the like kind the same line of conduct was pursued, and in 1853 the then minister at Berlin was instructed that 'the doctrine of inalienable allegiance is no doubt attended with great practical difficulties. It has been affirmed by the Supreme Court of the United States, and by more than one of the State Courts; but the naturalisation laws of the United States certainly assume that a person can by his own acts divest himself of the allegiance under which he was born and contract a new allegiance to a foreign power. But until this new allegiance is contracted he must be considered as bound by his allegiance to the government under which he was born and subject to its laws; and this undoubted principle seems to have its direct application in the present cases. . . . If then a Prussian subject, born and living under this state of law of military service, chooses to emigrate to a foreign country without

obtaining the "certificate" which alone can discharge him from the obligation of military service, he does so at his own risk;' and if such a person after being naturalised in the United States 'goes back to Prussia for any purposes whatever, it is not competent for the United States to protect him from the operation of the Prussian law.' Virtually, these instructions surrendered the right of expatriation. Verbally, no doubt, it is asserted; but a right of expatriation at the will of the individual ceases to exist when it is so subordinated to the duty of fulfilling conditions, to be dictated by the state from which the individual desires to separate, that non-fulfilment of them nullifies the effect of naturalisation as between him and it. A few years later American policy underwent another change. In 1859, questions having arisen between the United States and Prussia with reference to the conscription laws, Mr. Cass wrote that 'the moment a foreigner becomes naturalised his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him from his native country. . . . Should he return to his native country he returns as an American citizen, and in no other character.' From that time onwards the successive governments of the United States have shown a disposition to carry the right of expatriation to the furthest practicable point. Its acceptance was continually urged upon Prussia in the further negotiations which took place with that power; it was asserted in the correspondence between the United States and England; and in 1868 an Act passed both houses of Congress affirming that 'the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness,' and enacting that 'all naturalised citizens of the United States while in foreign states shall be entitled to and shall receive from their government the same protection of persons and property that is accorded to native-born citizens in like situation and circumstances[1].'

[1] Naturalisation Commission Report, 52-4 and 82. Story's and Kent's

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Germany. The laws of Prussia [extended first to the North German Confederation, and since 1871 to the whole German Empire] regard the state as possessing the right of imposing conditions upon expatriation, and consequently of refusing it unless these conditions are satisfied. By the regulations in force no person lying under any liability to military service can leave the kingdom without permission, and any one doing so is punished on his return with fine or imprisonment. Persons naturalised in the United States are excepted from the operation of these regulations by the treaty of 1868 between that country and the North German Confederation, which provides that a naturalised person can only be tried on returning to his country of origin for acts done before emigration, and thus excludes punishment for the act of emigration without consent of the state or in avoidance of its regulations [1].

France. In France the quality of a Frenchman is lost by naturalisation abroad, provided that he has attained the age of thirty or thirty-one years, and has consequently fulfilled his obligation to service in the active army.

Italy. In Italy naturalisation in a foreign country carries with it loss of citizenship, but does not exonerate from the obligations of military service, nor from the penalty inflicted on any one who bears arms against his native country.

Spain. Spain takes up the position that loss of nationality by naturalisation abroad is not accompanied with freedom from obligations to the state, unless it shall have been obtained with the knowledge and authorisation of the Spanish government [2].

Sweden. [Swedish citizenship is forfeited by any one who becomes a citizen of another country. But the consent of the king is

expressions of opinion may also be referred to in Shanks v. Dupont, Peters' Supreme Court Cases, iii. 246, and Commentaries, ii. 49.

[1] De Martens, Nouv. Rec. Gén. xix. 78.

[2] Dana (Note to Wheaton, No. 49) says that 'Spain contends for an unlimited right over returned subjects for subsequent as well as past obligations.' He does not however mention his authority, and the statement hardly seems to be consonant with the text of the Spanish law.

necessary before foreign naturalisation can be acquired. Men and unmarried women of Swedish nationality also lose their nationality if domiciled abroad for ten consecutive years, unless they have made a declaration before the expiration of that period of their intention to remain Swedish subjects.]

Norway.

By Norwegian law 'a state citizen loses his rights as such when he becomes a subject of a foreign state, and when he leaves the kingdom for ever,' except that he may within a year of his departure make a declaration before a Norwegian Consul of his intention to retain his nationality. The declaration is valid for ten years, and can be renewed.

Switzerland.

The law of Switzerland allows a Swiss citizen to renounce his nationality, if he has ceased to be domiciled in the country, if he is in actual enjoyment of civil rights in the country of his residence, and if he has acquired, or is 'assured of acquiring,' nationalisation there for himself, his wife, and his children under age[1].

Austria.

In Austria emigration is not permitted without consent of the authorities; persons emigrating or taking up a foreign national character with consent become foreigners; persons doing so without consent equally lose their Austrian nationality, and are punished by sequestration of any property which they may possess within the empire.

Russia.

The practice of Russia is not clear. There appears to be reason to suppose that a Pole naturalised in America was seized and forced to serve in the army in 1866; but in the same year another Pole was deprived of the rights of Russian citizenship and banished for ever for being naturalised in the United States without leave of the emperor. It is at any rate fair to conclude that the acquisition of foreign nationality is not regarded as *ipso facto* releasing a subject from his allegiance[2].

[1] Federal Law of 1876, in Rev. de Droit Int. xii. 318.

[2] Naturalisation Commission Report, Appendix. It would appear from several state papers quoted by Mr. Wharton (Digest, §§ 131 and 172) that the government of the United States were not in possession of distinct information as to the effect of Russian law up to the time of the publication of the Digest in 1886.

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Practice of states with regard to foreigners naturalised by them.

Turning from the views taken by states as to the position of their own subjects when naturalised abroad, to their practice with respect to the protection of foreigners who have been received into their own community; the naturalisation law of Russia is found to place strangers admitted to Russian nationality 'on a perfect equality in respect to their rights with born Russians.' [In Spain it seems that 'aliens,' who have obtained certificates of naturalisation, are not held to be freed from the obligations imposed by their nationality of origin, unless their naturalisation has taken place with the permission of their state.] In France it appears, from a correspondence which took place in 1848 between M. Crémieux, then Minister of Justice, and Lord Brougham, that the acquisition of French nationality is considered to involve of necessity the severance of all bonds between the naturalised person and his former state, and his absorption for all purposes into the French nation. In the other states above mentioned it does not appear to have been distinctly laid down as a general principle, or to have been shown by state action in particular instances, whether a foreigner, on receiving naturalisation, would be regarded as having acquired a right to protection as against his former country[1]. Judging from the analogy of their laws with respect to their own natural-born subjects, it may however be presumed that in Germany and Italy the right of a state would be recognised to look upon naturalisation of its subjects as conferring the quality of foreigner upon the persons naturalised to such extent only as it might itself choose. In each of these countries a subject naturalised abroad may be held responsible upon his return within their jurisdiction for contraventions of

[1] By the Swiss Law of 1876 it is provided that naturalisation shall not be granted unless 'les rapports' of the persons seeking naturalisation 'avec l'état auquel ils ressortissent sont tels, qu'il est à prévoir que leur admission à la nationalité suisse n'entraînera pour la confédération aucun préjudice.' But it does not appear what the effect of naturalisation, if granted, would be understood to be as against the state to which the naturalised persons before belonged.

municipal law committed after or simultaneously with naturalisation. That the number of punishable acts is small is of course unimportant. The fact that any acts done after or simultaneously with naturalisation are punishable affirms the principle that naturalisation does not of itself destroy the authority of the original sovereign[1]. In the case of Austria no inference can probably be safely drawn either from the law affecting its own subjects or that regulating the conditions of the naturalisation of foreigners[2].

Conclusions.

It may be taken that the practice of the foregoing states gives a fair impression of practice as a whole; and it may be assumed that when a state makes the recognition of a change of nationality by a subject dependent on his fulfilment of certain conditions determined by itself, or when it concedes a right of expatriation by express law, it in effect affirms the doctrine of an allegiance indissoluble except by consent of the state[3]. Such being the case, the doctrine in question, disguised though it may be, is still the groundwork of a vastly preponderant custom. It may be

[1] Where naturalisation is used to escape from liability to *future* military service the offence is only committed by the completion of the act of naturalisation; but the latter, if it be effective to substitute an entirely new nationality for that previously existing, must obliterate the criminal character of the act at the moment of its performance.

[2] Naturalisation Commission Report, Appendix; Calvo, §§ 765–71; Lawrence, Commentaire, iii. 299.

[3] Notwithstanding that M. Bluntschli holds the liberty of emigration not to be absolute, and to be subject to 'l'accomplissement préalable des obligations indispensables envers l'état,' such as military service, he thinks that 'contrairement à l'ancienne opinion qui considérait le sujet comme perpétuellement obligé envers son prince ou envers son pays, et qui ne lui permettait pas de briser ce lien de son autorité privée, on en est arrivé peu à peu à reconnaître le principe de la liberté d'émigration. Nul état civilisé ne pourra à la longue se soustraire à l'application de cette nouvelle et libérale maxime.' Rev. de Droit Int. ii. 115–6. It is difficult to understand how liberty of emigration as a principle can be consistent with a regulatory power in the state. Who but the state is to define the 'obligations indispensables' which must be satisfied? And if the state may draw up a list of these obligations, and may insert among them obligations stretching over a lifetime, liberty of emigration becomes illusory. Incompatible principles cannot occupy an equal position. In the long run one must yield to the other, and it is evident, as must inevitably be the case, that the principle of free emigration yields with M. Bluntschli to that of the supremacy of the state.

hoped, both for reasons of theory and convenience, that it will continue to be so. An absolute right of expatriation involves the anarchical principle that an individual, as such, has other rights as against his state in things connected with the organisation of the state society than the right not to be dealt with arbitrarily, or dissimilarly from others circumstanced like himself, which is implied in the conception of a duly ordered political community; it supposes that the individual will is not necessarily subordinated to the common will in matters of general concernment. As a question of convenience, the objections to admitting a right of expatriation are fully as strong. The right, if it exists, is absolute; it can therefore only be curtailed with the consent of each individual. But if the doctrine of permanent allegiance be admitted, there is nothing to prevent the state from tempering its application to any extent that may be proper. Action upon it in its crude form is obviously incompatible with the needs of modern life; but it is consistent with any terms of international agreement which the respective interests of contracting parties may demand, and if recognised in principle and taken as an interim rule where special agreements have not been made, it would do away with practical inconveniences which frequently occur, and which as between certain countries might in some circumstances give rise to international dangers. It would be a distinct gain if it were universally acknowledged that it is the right of every state to lay down under what conditions its subjects may escape from their nationality of origin, and that the acquisition of a foreign nationality must not be considered good by the state granting it as against the country of origin, unless the conditions have been satisfied. It may at the present day be reasonably expected that the good sense of states will soon do away with such rules as are either vexatious or unnecessary for the safeguarding of the national welfare[1].

[1] For the naturalisation laws of various states see Reports of Her Majesty's Representatives abroad upon the Laws of Foreign Countries, Parl. Papers, Miscell. No 3, 1893; and Cogordan, La Nationalité, Annexes.

Impropriety, on the part of a state granting nationality, of making the conditions of acquisition too easy.

In the meantime, and until an agreement is come to upon the question of principle, it may be said that though a state has in strictness full right to admit foreigners to membership, and to protect them as members, it is scarcely consistent with the comity which ought to exist between nations to render so easy the acquisition of a national character, which may be used against the mother state, as to make the state admitting the foreigner a sort of accomplice in an avoidance by him of obligations due to his original country. When naturalisation laws are so lax as to lend themselves to an avoidance of reasonable obligations, the state possessing them can have no right to complain if exceptional measures, such as expulsion from the mother country, are resorted to at the expense of its adopted subjects. After the annexation of Frankfort to Prussia, a number of young men of that town, taking advantage of the looseness of Swiss naturalisation laws, obtained naturalisation in Switzerland in order to avoid the incidence of the conscription laws, and returned to Frankfort intending to live there as Swiss subjects. The Prussian government expelled them, and the Swiss government admitted that its conduct was fully justified.

Effects of the naturalisation of parents on children who are minors at the date of naturalisation.

A difference of practice exists with respect to the effects of the naturalisation of a father upon children born before his naturalisation, but minors at the moment when it is effected. The laws of some countries, as for example of the United States and Switzerland, provide that the child of a foreigner who is naturalised, becomes himself naturalised, if he be a minor, by the naturalisation of his father. In other cases, as in that of France, a child retains his nationality of birth notwithstanding that the nationality of his father is changed. The latter doctrine is a strict but reasonable deduction from the principle of sovereignty; the former is certainly the more convenient. It would probably be still more convenient to adopt as a rule the provisions of a convention made between France and Switzerland in 1879; and to give a right of choice to the child on attaining his majority, he being freed up to that time, with respect to

both countries, from military and other special obligations flowing from allegiance.

Claims on the part of states to treat unnaturalised foreigners as subjects.

Questions have sometimes occurred, both with regard to the privileges and the responsibilities of the individual, as to the effect of domicil or of a partial completion of formalities required for the acquisition of nationality, and as to that of doing acts the right to perform which is reserved as a privilege to the citizens or subjects of a state.

A question of the former kind, which attracted much attention at the time, was given rise to by Martin Koszta, an Hungarian insurgent of 1848–9. The merits of the case as a whole were somewhat complicated; but the facts bearing on the present point were few and simple. At the end of the rebellion Koszta escaped to Turkey, whence he ultimately went to the United States. He stayed in the latter country less than two years, and then returned to Turkey upon business, after having made a statutory declaration of his intention to become an American citizen. While at Smyrna he was arrested by Austrian authorities claiming to have the right to do so under the capitulations between their state and Turkey, and he was put on board an Austrian war brig, the Hussar, for conveyance to Triest. Before the vessel got under weigh however an American frigate arrived, and threatened to sink the Hussar unless Koszta was at once delivered up. As the Austrian commander refused, and as from the position of the ships a conflict would have endangered the town, the matter was momentarily settled by the delivery of the prisoner to the French Consul to be kept until the two governments concerned should have an opportunity of arriving at a decision. In the end the affair was compromised by Austria consenting to Koszta being shipped off to the United States, the right to proceed against him in case he returned to Turkey being reserved. By the naturalisation law of the United States the conditions requiring to be fulfilled before admission to citizenship could take place were a residence of five years in the country, and a declaration of intention to become

a citizen made before a court of justice at least three years prior to application for admission. It could not therefore be pretended, and was not pretended, that Koszta was naturalised. The original action of the representatives of the United States seems nevertheless to have been suggested by the impression that a right to protection was acquired by the declaration of intention to be naturalised; the government at first went even further. President Pierce, in a message to Congress, declared that 'at the time of his seizure Koszta was clothed with the nationality of the United States.' Ultimately other ground was taken up. 'It is a maxim of International law,' wrote Mr. Marcy, 'that domicil confers a national character; it does not allow any one who has a domicil to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. . . . . As the national character, according to the law of nations, depends upon the domicil, it remains as long as the domicil is retained, and is changed with it. Koszta was therefore invested with the nationality of an American citizen at Smyrna, if he in contemplation of law had a domicil in the United States[1].' Domicil no doubt imparts national character

[1] Mr. Marcy's doctrine was strangely inconsistent with the law of the United States at the period when he wrote. It was no doubt open to him to argue that a person might be entitled to the protection of the United States as a member of the state community without being in possession of those privileges of citizenship which naturalisation would give him, because under the constitution of the Union several classes of persons are in that position; as for example Indians and the inhabitants of conquered country, the latter of whom, as was the case with the inhabitants of California after its conquest from Mexico, are aliens until they are admitted to citizenship by an act of Congress, but are nevertheless 'subjects' as between the United States and foreign powers (Halleck, ii. 456). But at the time in question persons of foreign nationality who had declared their intention of becoming citizens were incapable of receiving United States passports, and consequently could not have been regarded as subjects. Since then, by an act of 1863, such of them as were liable to military service were rendered capable of receiving passports; but in 1866 this act was repealed and it was provided that for the future passports should be issued to citizens only (Lawrence, Commentaire, iii. 193). Dr. Woolsey seems to think that the merits of the

for certain purposes; but those purposes, so far as they have to do with public international law, are connected with the rules of war alone, and Mr. Marcy's contention was wholly destitute of legal foundation. The ideas to which he gave expression were not however peculiar to himself; they seem to have been commonly held in America, and the action of the Confederate States with reference to conscription in 1862 rendered it necessary for the English government to urge the rudimentary doctrine, 'That a domicil established by length of residence only, without naturalisation or any other formal act whereby the domiciled person has, so to speak, incorporated himself into the state in which he resides, does not "for the time convert him into a subject of the domicil in all respects save the allegiance he owes his native sovereign." Such a domiciled person is not a *civis*, but a temporary subject, *subditus temporarius*, of the state in which he is resident.' Later, when the Northern States were in serious want of men in 1863, an act was passed subjecting foreigners to military service who had expressed their intention to become citizens. On this occasion Lord Russell, while apparently admitting that the scope of the act was not beyond the legitimate powers of a state over foreigners, represented that persons affected by it ought to be allowed a reasonable time to withdraw from the country. A proclamation was consequently issued giving sixty-five days for the departure of intending citizens. In stating in the preamble that its issue was caused by a claim made on behalf of such persons to the effect that under the law of nations they retained the right of renouncing their purpose of becoming citizens the government of the United States went further than it was asked; and in giving what was demanded not as a concession but as a right, abandoned all

case are affected by the fact that Koszta was in possession of a passport given to him by the American Consul at Smyrna; but a passport granted in contravention of the laws of the United States was obviously a mere piece of waste paper. In the fifth edition of his work Dr. Woolsey adds the admission, that Koszta's 'mere declaration to become a citizen of the United States did not affect his nationality' (§ 80).

assertion of right to control persons as being citizens whose naturalisation is incomplete, and by implication abandoned also the assertion of a right to protect them [1].

The position of persons exercising rights reserved to subjects is different [2]. Whether or not they have been allowed to exercise them under a misapprehension as to their being subjects is immaterial. They have shown by their own acts that they wish to share in privileges understood to belong to subjects only, and they cannot afterwards turn round and repudiate their liability to correlative responsibilities. During the American civil war the English government very properly refused to interfere on behalf of British subjects who had placed themselves in this situation. It does not follow that such persons are in a better position than ordinary foreigners as between third states and the state within which they have arrogated to themselves the rights of subjects, and the burdens of which they must consequently bear. Third states, and the state of origin when it acknowledges naturalisation as changing nationality, can only look to the fact that the naturalisation laws of the state naturalising have or have not been fully complied with. Until these laws are satisfied the state into which a person has immigrated can have no right of protecting him.

The question arising out of sovereignty in relation to subjects with which international law deals.

When once the persons who are indisputably the subjects of a state, or whom it may regard as such, are ascertained, no question having special reference to sovereignty in its relation to the subjects of the state remains to be considered. International law has nothing to do with the authority exercised over a subject within the jurisdiction of a state, whether such jurisdiction be territorial or is that which is possessed in unappropriated places. Within the jurisdiction of a foreign state no authority exists, except in so far as those immunities from jurisdiction extend,

[1] Report of the Naturalisation Laws Commission, Appendix, pp. 42–5; De Martens, Causes Cél. v. 583.

[2] For acts unreasonably taken as showing intention of adopting the local national character, cf. antea, p. 216.

which are discussed elsewhere[1], as having more immediate connexion with sovereignty in its relation to territory; the state may issue any commands not incompatible with its duties to the foreign state, but it cannot of course enforce them except by the sanctions of municipal law, and consequently in places within its own jurisdiction. Finally, the right of protecting subjects abroad falls under the head of self-preservation[2].

Persons destitute of nationality, or of uncertain nationality.

In a certain number of cases it is possible for persons to be destitute of any national character. In Austria, for example, any one emigrating without permission of the state loses his nationality by the act of emigrating, and is consequently without nationality until or unless he is formally received into another state community; in the Argentine Confederation a foreign woman does not acquire the nationality of her husband on marrying an Argentine citizen, although she may have lost her nationality of origin by marrying a subject of another state; and the illegitimate son of an Englishwoman born in Russia, though British in the eye of Russian law, is of no nationality elsewhere, since by English law he is not British, and by Russian law he is not Russian. It is evident that the existence of numerous persons in like condition would be embarrassing; and it appears that much inconvenience was in fact caused until lately both in Germany and Switzerland by the presence of individuals who either had no nationality, or whose nationality it was impossible to determine. It was ultimately settled by convention as between the Swiss Cantons and as between the German states that any one found to be in either of these positions should be considered to be a subject of the state in which he was living, provided that he had resided there five years since attaining his majority, or had stayed there six weeks after his marriage, or finally had married there. It might be useful to adopt, as an international rule, a practice of ascribing a nationality of domicil to persons without nationality or of uncertain national character.

[1] See antea, pt. ii. chap. iv. 172 et seq.

[2] See postea, p. 278.

CHAPTER VI

JURISDICTION IN PLACES NOT WITHIN THE TERRITORY OF ANY STATE

General view of the jurisdiction exercised by states in places not within the territory of any state.

On the unappropriated sea, and on land not belonging to any community so far possessed of civilisation that its territorial jurisdiction can be recognised, it is evident that, as between equal and independent powers, unless complete lawlessness is to be permitted to exist, jurisdiction must be exercised either exclusively by each state over persons and property belonging to it, or concurrently with the other members of the body of states over all persons and property, to whatever country they may belong. The former of these alternatives is that which is most in consonance with principle. It has been seen that the state retains control over the members of the state community when beyond its territorial jurisdiction in so far as such control can be exercised without derogating from the territorial rights of foreign states, so that with respect to individuals there is always a state in a position to assert a claim to jurisdiction higher than any which can be put forward by other states; and although jurisdiction cannot be founded on non-territorial property so as to exclude or diminish territorial jurisdiction, the possession of an object as property at least forms a reasonable ground for the attribution of exclusive control to its owner when no equal or superior right of control can be shown by another. Concurrent jurisdiction could therefore only be justified by a greater universal convenience than several jurisdiction can secure, and in most cases, so far from universal convenience being promoted, it would be distinctly interfered with, by the admission of a common right of jurisdiction on the part of all nations. It is consequently

the settled usage that as a general rule persons belonging to a state community, when in places not within the territorial jurisdiction of any power, are in the same legal position as if on the soil of their own state, and that, also as a general rule, property belonging to a state or its subjects, while evidently in the possession of its owners, cannot be subjected to foreign jurisdiction.

For special reasons however exceptions are sometimes made to this usage. It has been already pointed out that in time of war a neutral state frees itself from responsibility for acts done outside its frontier by its subjects, when they are not employed as its own agents, by allowing a belligerent to exercise so much jurisdiction over them and their property as is necessary for the protection of his right to attack an enemy in the various ways sanctioned by the customs of war. In such cases the right of jurisdiction is wholly abandoned within defined limits. Concurrent jurisdiction, again, is conceded by a country to a specific foreign state when subjects of the former take passage or service on board the vessels of the latter, and to all foreign states when the crew of a ship belonging to it is guilty of certain acts which go by the name of piracy. Finally, when persons on board a ship lying in or passing through foreign waters commit acts forbidden by the territorial law the local authorities may pursue the offending vessel into the open sea in order to vindicate their jurisdiction.

Theory of the territoriality of vessels.

It is unquestioned that in a general way a state has the rights and the responsibilities of jurisdiction over ships belonging to it while they are upon the open sea, but a difference of opinion exists as to the theoretical ground upon which the jurisdiction of the state ought to be placed, and this is so wide-reaching and important in its effects as to make it worth while to examine carefully into the reasonableness of the doctrines on either side and into the amount of authority by which they are respectively supported.

According to some writers ships are floating portions of the

country upon which they depend, or, as the doctrine is sometimes expressed, they are a 'continuation or prolongation' of territory. According to others the jurisdiction possessed by a state over its ships upon the ocean arises simply from the fact that no local jurisdiction exists there; it is necessary for many purposes that jurisdiction over a vessel shall be vested in a specific state; it is natural to concede a right of jurisdiction to the owner of property until his claim as such is opposed by a superior title on the part of some one else; and all states being equally destitute of local rights upon the ocean, no right to jurisdiction over a vessel can, within the range of the purposes contemplated, be superior to that of the state owning it. According to this theory it does not follow that there are no rights other than those of the owner which are ever able to assert themselves. Claims springing from property may, for example, be confronted with claims based on the rights of self-preservation. And as claims which are ultimately founded on the latter right are actually made by belligerents, the theory has at least the advantage of fitting in better with existing practice than the competing doctrine. If the latter is authoritative, usages such as that of the capture of neutral vessels for contraband trade, instead of being sanctioned under the general principles of international law, would become exceptional and be thrown upon their defence. The legal position of merchant ships in territorial waters would also be affected, and it would be necessary upon that point to admit and to go beyond the views of the French school which have already been stated and rejected.

Its history.

It does not appear that the doctrine of the territoriality of vessels can be traced further back than to the 'Exposition des Motifs' put forth in 1752 by the Prussian government in justification of its behaviour in confiscating the funds payable to its English creditors in respect of the Silesian Loan[1]. In that repertory of bad law it is said that 'the Prussian vessels, although laden with property belonging to the enemies of England, were

[1] See postea, p. 370 n.

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a neutral place, whence it follows that it is exactly the same thing to have taken such property out of the said vessels as to have taken it upon neutral territory[1].' The assertion, of which the object was to produce the impression that the English, in acting upon an ordinary usage, had been guilty of illegal conduct, was supported by no reasoning. In its origin therefore the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad. A few years later the idea reappears in Vattel, but he uses it only incidentally to explain a particular custom, and evidently without adequate consideration of its scope and bearings. Children born at sea, he says, if born in a vessel belonging to the state of which their parents are subjects, 'may be considered to be born within the territory, for it is natural to regard the ships of the nation as parts of its territory, especially while they navigate unappropriated waters, since the state preserves its jurisdiction over them[2]. With Hübner the doctrine holds a more conspicuous position. A proof was required that enemy's goods ought not to be captured on board neutral vessels. Let the territoriality of merchant ships be granted and the proof was found. 'It is universally agreed that a belligerent cannot attack his enemy in a neutral place, nor capture his property there. Neutral vessels are unquestionably neutral places. Consequently when they are laden with enemy's goods a belligerent has no right to molest them because of their cargoes[3].' The question is simply begged. The territoriality of a vessel is a metaphorical conception; and before a metaphor can be employed as an operative principle of law, it must be proved to have been so adopted into law as to render its use necessary, or at least reasonable. It was impossible for Hübner to show this. It would have been idle for him to appeal to the exterritoriality of sovereigns, ambassadors, or ships of war, as one generally accepted, even if it had then been in fact

[1] De Martens, Causes Cél. ii. 117.

[2] Liv. i. ch. xix. § 216.

[3] De la Saisie des Bâtimens Neutres, tom. i. p^tie ii. ch. ii. § 6.

more fully accepted with respect to ships of war than it actually was. Enough has been said in stating the respective characteristics of ships of war and commerce, and the reasons for which privileges are conceded to the former within the territory of foreign countries, and even in giving the arguments by which the French view as to the position of merchant vessels in foreign ports is supported, to show that the analogy between the two classes of vessels is not close enough to require that a mode of treating the one shall be extended to the other at the cost of a reversal of usage. And usage, so far as merchant vessels was concerned, was wholly inconsistent with the doctrine of territoriality.

Notwithstanding that the theory was thus destitute of foundation, it has always had a certain number of adherents, it is probably adopted definitively by several states, it is professed by living or recent writers of current authority, and its influence is no doubt felt in much that is written against the established customs of maritime war.

Its inadmissibility.

The modern advocates of the doctrine are somewhat too apt to affirm that 'international law has long admitted the principle that a ship leaves the country to which it belongs as a floating portion of its territory,' without adducing any proof of its admission. If they endeavour to prove the correctness of their view, they say with Massé that, as sovereignty cannot be established over the seas, jurisdiction cannot be exercised there except over property by the state owning it, and that acts done on the high seas under the flag of a state are reputed to be done on the soil of that state[1].

[1] Bluntschli, § 317; Massé, liv. ii. tit. i. ch. ii. sect. ii. § 10, art. i. See also Heffter, § 78; Hautefeuille, Droits et Devoirs des Neutres, tit. vi. ch. i. sect. 1; Negrin, 95.

Ortolan (Dip. de la Mer, liv. ii. ch. x) appears to hold that merchant vessels are territorial upon the ocean, and lose their territorial character on entering territorial waters.

The territoriality of merchant vessels is not admitted by Lampredi (Com. dei Pop. Neut. pt. i. § xi), Wheaton (Elem. pt. ii. ch. ii. § 10), Manning (Law of Nations, p. 275, Abdy's ed.), Riquelme (i. 222), Twiss (i. § 159), Fiore (pt. ii. ch. v. ed. 1868), Harcourt (Letters of Historicus, No. x).

The doctrine of the non-territoriality of merchant vessels has always been

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Both statements are inconsistent with the facts. They are only true of cases in which no other state than that to which a vessel belongs has an interest in also exercising jurisdiction; they are true of the effect of births, wills, &c., but they are not true, for example, when a vessel carries goods contraband of war, the seizure of which upon neutral territory would be a gross violation of sovereignty.

International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now

strongly, and often too strongly, held by English governments. Its position in their view at the beginning of the present century was expressed without exaggeration by Lord Stowell when he said that 'the great and fundamental principle of British maritime jurisprudence is, that ships upon the high seas compose no part of the territory of a state. The surrender of this principle would be a virtual surrender of the belligerent rights of this country.' (Sir W. Scott, Report in Impressment Papers, 1804, quoted in Append. to Report of Naturalisation Commission, p. 32.) The doctrine was not only maintained to the full, but in dealing with impressment it was pushed beyond its natural limits, and was converted into an assertion of concurrent jurisdiction, not by way of a customary exception, but as a matter of principle independently of general consent. Of course the conduct of England at the period in question had much to do with the vivacity which has been displayed by the fiction with which her doctrine was incompatible; and it tended to drive the United States into the opposite extreme. By the latter power in fact the territoriality of the merchant vessel has been distinctly asserted. Mr. Webster, writing to Lord Ashburton (Aug. 8, 1842) with reference to impressment, says, 'Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, by a belligerent, is an act of force, and is *primâ facie* a wrong, a trespass, which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations.' Ib. p. 60.

it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it[1]. The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which of course cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight.

Limits of the jurisdiction of a state over its merchant vessels in non-territorial waters.

Putting aside the fiction of territoriality as untenable, it may be taken for granted that the jurisdiction exercised by a state over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists; this being a reasonable theory, and the only one which enters into competition with the doctrine of territoriality. It only remains therefore to see what are the limits of the jurisdiction thus possessed. As might be expected, it is sufficient to provide for the good order of the seas, and excludes foreign jurisdiction until grave reason can be shown for its exercise. Its extent may be defined as follows. A state has—

1. Administrative and criminal jurisdiction so as to bring all acts cognizable under these heads, whether done by subjects or foreigners, under the disciplinary authority established in virtue

[1] Manning, p. 276.

of state control on board the ship and under the authority of the state tribunals[1].

2. Full civil jurisdiction over subjects on board, and civil jurisdiction over foreigners to the extent and for the purposes that it is exercised over them on the soil of the state, unless partial exemption is given to them when on board ship by the municipal law of the state.

3. Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers, unless she commits acts of hostility against them, or does certain acts during war between two or more of them which belligerents are permitted to restrain[2], or finally, escapes into non-territorial waters after committing, or after some one on board has committed, an infraction of the law of a foreign country within the territory of the latter.

A state is responsible for all acts of hostility against another state done on the ocean by a merchant vessel belonging to it, and it is bound to offer the means of obtaining redress in its courts for wrongful acts committed against foreign individuals by her or by persons on board her. It is not responsible for those acts above mentioned which belligerents are permitted to restrain, or for acts, to be defined presently, which constitute piracy.

With respect to ships of war and other public ships little need

[1] It is worth while to note that an effect of this jurisdiction is to sometimes change the character of continuing acts, done partly in foreign territorial waters and partly on the high seas, so that acts innocent under foreign jurisdiction may become punishable when the vessel by issuing from it becomes subject to the criminal jurisdiction of its own country. Thus, in the case of Reg. v. Lesley (Bell's Crown Cases Reserved, 220), the defendant, who was master of a merchant vessel, entered into a contract with the Chilian government to bring over to England certain Chilian subjects, who had been sentenced to banishment. The banished persons were put on board, and were retained on board, against their will. On the arrival of the vessel in England the defendant was indicted and convicted for false imprisonment; it being held that the detention of his unwilling passengers, though perfectly justified within Chilian waters, became unlawful so soon as the vessel crossed their boundary.

[2] See postea, pt. iv. chaps. v, vi, vii.

Jurisdiction over public vessels.

be said. The fiction of territoriality is useless, but it is harmless; because it cannot cause larger privileges to be attributed to such vessels than they are acknowledged for other reasons to possess. They represent the sovereignty and independence of their state more fully than anything else can represent it on the ocean; they can only be met by their equals there; and equals cannot exercise jurisdiction over equals. The jurisdiction of their own state over them is therefore exclusive under all circumstances, and any act of interference with them on the part of a foreign state is an act of war.

Jurisdiction of a state over foreigners in its ships.

It follows from the amount of jurisdiction possessed by a country over its vessels upon the ocean that a state concedes to a foreign power concurrent jurisdiction over its subjects serving or taking passage in ships belonging to the latter. All acts done, or things occurring, on board have the same civil or criminal value relatively to the foreign state, and entail the same consequences, as if done within the territory of the latter. On the other hand it may be repeated that the state of which the subjects are on board a foreign ship can of course appreciate such acts or occurrences in whatever way it chooses, and may affix what consequences it likes to them, as within its own territory, provided that it does not supplant or exclude the primary jurisdiction of the country to which the vessel belongs[1].

[1] It may be worth while to mention a somewhat recent illustrative case. An English sailor on board an American vessel stabbed the mate. On the arrival of the vessel at Calcutta the sailor was handed over to the police for safe keeping. The commission of the crime having been thus brought to the notice of the authorities, they put the sailor on his trial under an Indian statute considered by the High Court of Calcutta to give the courts of the Empire jurisdiction over crimes committed by British subjects on the high seas, even though such crimes should be committed on board a foreign vessel. After the man was convicted the Consul General of the United States applied for his extradition, which was refused on the ground that the government of India was unable to order the surrender of a person on a charge in respect of which he had already been tried and convicted by a competent British court. Upon this the American Minister in London complained to the British government of the exercise of jurisdiction of the High Court, urging that 'as regards common crimes committed on board merchant vessels on the high seas, the competent tribunals of the vessel's nation have exclusive

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Pursuit of a vessel into non-territorial waters for infractions of law committed in territorial waters.

It has been mentioned that when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them [1]. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful [2].

jurisdiction of the question of trial and punishment of any person thus accused of the commission of a crime against its municipal law.' On examination it was found that the statute under which the trial took place did not confer the supposed powers; the British government therefore expressed its 'regret that the action of the authorities at Calcutta should have been governed by a view of the law which, in the opinion of Her Majesty's government, cannot be supported'; but it at the same time recorded its dissent from the general proposition laid down by the American Minister. It was 'not prepared to admit that a statute conferring jurisdiction on the court of the country of the offender, in the case of offences committed by its own subjects on the high seas, on board a foreign vessel or in places within foreign jurisdiction, would violate any principle of International Law or comity. On the contrary,' it was 'of opinion that there are many cases in which the conferring of such jurisdiction would subserve the purposes of justice, and be quite consistent with those principles. Such an assumption of jurisdiction does not involve a denial of jurisdiction on the part of the state in whose territory the offence was committed; it involves no more than the right of concurrent jurisdiction.' Probably, as indicated in the text, the claim to strictly concurrent jurisdiction is excessive. It might be best that extradition of an accused person, who has fallen into the hands of his territorial authorities, should be regarded as due whenever it is applied for before committal for trial, or equivalent conclusion of preliminary or instructional proceedings.

[1] Bluntschli, § 342; Woolsey, § 58.

[2] A doctrine has lately been suggested, to which it may be worth while to devote a few words. In the arguments laid before the Behring Sea Arbitral

Piracy.

Pirates, according to Bynkershoek [1], are persons who depredate by sea or land without authority from a sovereign. The definition, like most other definitions of pirates and piracy, is at once too wide and too narrow to correspond exactly with the acts which are now held to be piratical, but it may serve as a starting-point by directing attention to the external characteristic by which, next to their violent nature, they are chiefly marked. Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organised political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject. So long as acts of violence are done under the authority of the state, or in such way as not to involve its supersession, the state is responsible, and it alone exercises jurisdiction. If a commissioned vessel of war indulges

Tribunal, on behalf of the United States, it was advanced as a proposition of law that a state has a right to make enactments under which it can assume jurisdiction upon the high seas, exercisable at an indefinite distance outside territorial waters, for the purpose of safeguarding property, and of protecting itself against acts 'threatening invasion of its interests.' The laws so passed were alleged to be 'binding upon other nations because they are defensible acts of force which a state has a right to exert.' In support of the supposed right, the practice of nations was adduced in the form of 'Hovering Acts,' of fishery regulations, &c. It was not difficult for Great Britain to show that the laws, by which it was argued that she and other states had acted in conformity with the American pretension, were either restricted in their operation to territorial waters, or were, probably everywhere, and certainly in the case of the more important countries, intended only to be enforced upon foreigners subject to the assent of their own government. The arguments from precedent therefore fell to the ground. As regards the principle involved, it will be seen later (pp. 269 et seq.) that a right of self-defensive action upon the high seas, and even within the territory of a foreign power, undoubtedly exists; but it will also be seen that its exercise is limited to cases of grave and sudden emergency, and that the very ground and essential nature of the right are incompatible with the steady and regular application of law. Subject to the isolated practice mentioned in the text, the laws of a state can only run outside its territorial waters against the vessels and subjects of another state with the express or tacit consent of the latter.

[1] Quæst. Jur. Pub. lib. i. cap. xvii.

in illegal acts, recourse can be had to its government for redress; if a sailor commits a murder on board a vessel the authority of the state to which it belongs is not displaced, and its laws are able to assert themselves; but if a body of men of uncertain origin seize upon a vessel and scour the ocean for plunder, no one nation has more right of control over them, or more responsibility for their doings, than another, and if the crew of a ship takes possession of it after confining or murdering the captain, legitimate authority has disappeared for the moment, and it is uncertain for how long it may be kept out. Hence every nation may seize and punish a pirate, and hence, in the strong language of judges and writers whose minds have dwelt mainly upon piracy of a particular sort, he is reputed to be the enemy of the whole human race.

When the distinctive mark of piracy is seen to be independence or rejection of state or other equivalent authority, it becomes clear that definitions are inadequate which, as frequently happens, embrace only depredations or acts of violence done *animo furandi*. If a vessel belonging to an extinguished state were to keep the seas after the national identity had been wholly lost, and were to sink the vessels and kill the subjects of the victorious state, the intention to plunder would be absent, but the act at bottom would be the same as one in which that intention was present. In both cases the acts done would be acts of violence committed by persons having no right to perform them without authority from a politically organised society, but having no such society behind them; and in both cases they would be acts for which no remedy could be obtained except upon the persons by whom they were done.

It may on the other hand be worth while to remark that a satisfactory definition of piracy must expressly exclude all acts by which the authority of the state or other political society is not openly or by implication repudiated. Probably it is never intended to convey anything else, but the language of some writers is sufficiently loose to render it uncertain whether cases

even of common robbery, cognizable only by the sovereign of the criminals, might not fall within the scope of the words used.

It is generally said that one of the conditions of the piratical character of an act is the absence of authority to do it derived from any sovereign state. Different language would no doubt have been employed if sufficient attention had been earlier given to societies actually independent, though not recognised as sovereign. Most acts which become piratical through being done without due authority are acts of war when done under the authority of a state; and as societies to which belligerent rights have been granted have equal rights with permanently established states for the purposes of war, it need scarcely be said that all such acts authorised by them are done under due authority. Whether the same can be said of acts done under the authority of politically organised societies which are not yet recognised as belligerent may appear more open to argument, though the conclusion can hardly be different. Such societies being unknown to international law, they have no power to give a legal character to acts of any kind; at first sight consequently acts of war done under their authority must seem to be at least technically piratical. But it is by the performance of such acts that independence is established and its existence proved; when done with a certain amount of success they justify the concession of belligerent privileges; when so done as to show that independence will be permanent they compel recognition as a state. It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with

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public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state. The only reason therefore for punishing him as a pirate is that an unrecognised political society cannot offer a sufficient guarantee that the agents employed by it will not make the warlike operations in which they are engaged a cloak for indiscriminate plunder and violence. The reason seems hardly adequate. It is enough that the power must always exist to treat them as pirates so soon as they actually overstep the limits of political action. The true view then would seem to be that acts which are allowed in war, when authorised by a politically organised society, are not piratical. Whether a particular society is or is not politically organised is a question of fact which must be decided upon the circumstances of the case.

Usually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilised power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission may be assumed to be accidental. Piracy no doubt cannot take place independently of the sea, under the conditions at least of modern civilisation; but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical[1].

[1] Molloy (bk. i. ch. iv. § 1) describes a pirate as 'a sea thief, a hostis humani generis, who to enrich himself, either by surprise or open force, sets upon merchants or other traders by sea.' Casaregis (disc. lxiv. 4) says:

If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of a state through descent from the sea, by a body of men acting independently of any politically organised society.

In what it consists.

The various acts which are recognised or alleged to be piratical may be classed as follows:—

Classification of acts which are piratical, or are

1. Robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use.

'Proprie pirata ille dicitur qui sine patentibus alicujus principis ex propria tantum et privata auctoritate per mare discurrit depredandi causa.' Kent (Comm. i. 183) calls piracy 'a robbery or a forcible depredation on the high seas, without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility.' Wheaton (Elem. pt. ii. ch. ii. § 15) defines piracy as being 'the offence of depredating on the seas, without being authorised by any sovereign state, or with commissions from different sovereigns at war with each other.' Riquelme (i. 237) says that 'los piratas, segun la ley de las naciones, son aquellos que corren los mares por su propia autoridad, y no bajo el pabellon de un Estado civilizado, para cometer toda clase de desafueros á mano armada, ya en paz ya en guerra, contra los buques de todos los pueblos.' Ortolan (Dip. de la Mer, liv. ii. ch. xi) considers that 'à proprement parler, dans le sens le plus restreint et le plus généralement adopté, les pirates ou forbans sont ceux qui courent les mers de leur propre autorité, pour y commettre des actes de déprédation, pillant à main armée, soit en temps de paix, soit en temps de guerre, les navires de toutes les nations, sans faire aucune distinction que celle qui leur convient pour assurer l'impunité de leurs méfaits.' Phillimore (i. § ccclii) calls piracy 'an assault upon vessels navigated on the high seas, committed animo furandi, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury.' Heffter (§ 104) says that it 'consiste dans l'arrestation et dans la prise violente de navires et des biens qui s'y trouvent, dans un but de lucre et sans justifier d'une commission délivrée à cet effet par un gouvernement responsable.' Bluntschli (§ 343) lays down that 'les navires sont considérés comme pirates, qui sans l'autorisation d'une puissance belligérante cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui.' Calvo (§ 1134) understands by piracy 'tout vol ou pillage d'un navire ami, toute déprédation, tout acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger, soit en temps de paix, soit en temps de guerre.'

Bernard (The Neut. of Great Britain, 118) and Dana (Notes to Wheaton, Nos. 83-4) have valuable remarks on what does, and what does not, constitute piracy.

alleged to be piratical.

2. Depredation upon two belligerents at war with one another under commissions granted by each of them.

3. Depredations committed at sea upon the public or private vessels of a state, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political. Strictly all acts which can be thus described must be regarded as in a sense piratical. In the most respectable instances they are acts of war which, being done in places where international law alone rules, or from such places as a base, and being therefore capable of justification only through international law, are nevertheless done by persons who do not even satisfy the conditions precedent of an attempt to become subjects of law, and who cannot consequently claim like unrecognised political societies to be endeavouring to establish their position as such. Often however the true character of the acts in question is far from corresponding with their legal aspect. Sometimes they are wholly political in their objects and are directed solely against a particular state, with careful avoidance of depredation or attack upon the persons or property of the subjects of other states. In such cases, though the acts done are piratical with reference to the state attacked, they are for practical purposes not piratical with reference to other states, because they neither interfere with nor menace the safety of those states nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction.

4. A disposition has occasionally been shown to regard as pirates persons taking letters of marque from one of two belligerents, their own state being at peace with the other belligerent. In 1839, France being at war with Mexico, Admiral Baudin, commanding the fleet of the former power, notified that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not

Mexican subjects by birth, would be considered piratical and treated as such; and in 1846, during the war of the United States with Mexico, President Polk suggested in a message to Congress that it might be a question for the criminal courts to decide whether bearers of commissions, issued in blank by the Mexican government, and sold to foreigners by its agents abroad, ought not to be regarded as pirates[1]. That the views entertained by the French and American governments on these occasions were at variance with usage is confessed, but some writers hold that usage ought to be modified in conformity with them. It is argued that the change should be made because vessels acting in the manner contemplated would be disavowed by the state to which they properly belong, and because it would decline to be responsible for them; because, on the other hand, they do not belong to the state of which they carry the commission, since 'they fulfil none of the conditions required for the impress of a national character;' they are thus destitute of any nationality. The reasoning does not appear to be very conclusive. A vessel cannot be treated as piratical for the mere absence of a clear national character, because a clear national character is at least as much wanting to the vessels of a simply belligerent community as to foreign vessels employed by a sovereign state. In both cases, the acts purporting to be done being in themselves permissible, or at least not criminal, when authorised by a state or other political community, and criminal when not so authorised, the essential point must be that a responsible state or equivalent of a state shall really exist; and it is impossible to maintain that the grant of letters of marque or commissions to foreign vessels does not impose complete

[1] Ortolan, Dip. de la Mer, liv. ii. ch. xi, and Annexe H. The United States appear to have made it an object of their policy to secure by treaty from other states that the acceptance of letters of marque by the subjects of a state from one foreign country against another should be reckoned piracy; see e.g. treaties with France, 1778 (De Martens, Rec. ii. 597); England, 1794 (id. v. 678); Venezuela, 1836 (Nouv. Rec. Gén. xiii. 564); Guatemala, 1849 (id. xiv. 318).

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responsibility upon the government issuing them. That a practice of granting such letters or commissions would be highly objectionable, and that it would give rise to the most serious abuses, is indisputable; but to say this, and to say that the persons receiving them ought to be treated as pirates, are two very distinct things. The true safeguard against the evils which would spring from the practice would be to conclude treaties binding the contracting powers not to issue such letters or commissions. Fortunately the smallness of the number of states which have not now become signataries of the Declaration of Paris renders the question of little importance. It would indeed be hardly worth discussing but for the opportunity which it gives of indicating that the true nature of piracy has been consistently observed in the formation of authoritative custom[1].

Presumption in favour of the innocence of a public vessel doing acts *primâ facie* piratical.

It follows from the intimacy of the connexion between a state and its public vessels that acts done by the latter must always be presumed in the absence of distinct proof to the contrary to be done under the authority of the state. Whatever therefore may be the nature of the acts done by a ship of war or other public vessel, it cannot be treated as a pirate unless it has evidently thrown off its allegiance to the state under circumstances which prevent it from being looked upon as the instrument of another politically organised community, or unless under like circumstances it has been declared to be piratical by the legitimate government. Unless one or other of these things has occurred, redress for excesses committed by it can only be sought, as the case may demand, either from the regular government of the state or from that of its seceded portion.

As a general rule the vessels of all nations have a right to

[1] Ortolan, Dip. de la Mer, liv. ii. ch. xi; Calvo, § 1145. Treaties binding the contracting powers not to issue letters of marque to subjects of neutral states were formerly frequent. Besides the treaties between the United States and other powers already cited, see those between England and France, 1786 (De Martens, Rec. iv. 157); Denmark and Genoa, 1789 (ib. 447); Russia and Sweden, 1801 (id. vii. 331); France and Venezuela, 1843 (Nouv. Rec. Gén. v. 170); France and Chile, 1852 (id. xvi. 9).

Jurisdiction over pirates.

seize a pirate and to bring him in for trial and punishment by the courts of their own country irrespectively of his nationality or of the nationality, if any, of the vessel in which he may be found; and when weighty reasons exist for suspecting that a vessel is piratical all ships of war have a right to visit her for the purpose of ascertaining her true character. When however piratical acts have a political object, and are directed solely against a particular state, it is not the practice for states other than that attacked to seize, and still less to punish, the persons committing them. It would be otherwise, so far as seizure is concerned, with respect to vessels manned by persons acting with a political object, if the crew, in the course of carrying out their object, committed acts of violence against ships of other states than that against which their political operation was aimed, and the mode in which the crew were dealt with would probably depend upon the circumstances of the case.

Some of the points connected with piracy of a more or less political complexion may be illustrated from recent occurrences.

Cases of the insurgents of Carthagena,

In 1873 a communalist insurrection broke out in the south-east of Spain, and the Spanish squadron stationed at Carthagena fell into the hands of the insurgents. The crews of the vessels composing the squadron were proclaimed pirates by the government of Madrid, and it became necessary for states having vessels of war in the western Mediterranean to instruct the commanders as to the line of conduct to be adopted by them. Instructions were accordingly given by the governments of England, France and Germany; these, though communicated by each government to the others, were drawn up and issued without previous concert; they were however so similar as to be nearly identical. French and German naval commanders were ordered to allow freedom of action to the insurgent vessels so long as the lives or the property of subjects of their respective states were not threatened; the orders given to British officers differed only in directing interference in the case of danger to Italian as well as to English persons or property. If in the

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course of any interference which might be needed, Spanish persons or ships were captured, British commanders were to hand over their prisoners and the property seized to the agents of the government of Madrid. Thus, the piracy of the Carthagenians being political, no criminal jurisdiction was assumed over them; and though the right of summary action was asserted, its exercise was limited to the requirements of self-protection [1].

The *Huascar*,

In 1877 a revolutionary movement took place in Peru, the first step in which consisted in the seizure at Callao of the ironclad *Huascar* by the crew and some of her officers. The ship got under weigh immediately for Iquique, where it was expected that the leader of the movement would be met, and in the course of the next few days, apparently while on her way thither, she took a supply of coals from a British ship without making any arrangement as to payment, and also stopped a British steamer, from which Colonels Varela and Espinosa, two government officials, were taken by force. In the meantime the Peruvian government had issued a decree stating that it would not be responsible for the acts of the persons on board the *Huascar*, of whatever nature they might be. Under these circumstances Admiral de Horsey, who was in command of the English squadron in the Pacific, regarding the acts of the *Huascar* as 'piratical against British subjects, ships, and property,' attacked her [with the *Shah*] and fought an action which remained undecided at nightfall, so that the *Huascar* was able to escape and surrender to a Peruvian squadron. In Peru the occurrence gave rise to great excitement, in which the government shared or affected to share, and a demand for satisfaction was made upon England. There the question was referred to the law officers of the crown, who reported in effect that the acts of the *Huascar* were piratical. The conduct of the Admiral was in consequence approved, and the matter was allowed to drop by Peru [2].

[1] Calvo, §§ 1146–8.

[2] Parl. Papers, Peru, No. 1, 1877.

The *Virginius.*

In 1873, during the insurrection of part of Cuba against Spain, an affair took place of a widely different nature. The *Virginius*, a vessel registered as the property of an American citizen, but in fact belonging to certain Cuban insurgent leaders, had sailed from New York in 1870 as an American ship, and after making sundry voyages for insurgent objects, found herself at Kingston in the first-mentioned year. There she took on board some men intended to be landed in Cuba, shipped a quantity of fresh hands, who were ignorant of the true destination of the vessel, and set sail ostensibly for Limon Bay in Costa Rica. While on her way to Cuba, but upon the open sea, she was chased by and surrendered to the Spanish vessel, the *Tornado*. She was taken into Santiago de Cuba, and the greater part of those on board, including several British subjects shipped in Jamaica, were shot by order of the general commanding the place. When the *Virginius* was captured she was undoubtedly engaged in an illegal expedition, but she had committed no act of piracy, she was sailing under the flag of the United States and with American papers, she offered no resistance, and was in fact unfitted both for offence and defence by the character of her equipment. Although therefore the Spanish authorities had ample reason for watching her, for seizing her if she entered the Cuban territorial waters, and possibly even for precautionary seizure upon the high seas, no excuse existed for regarding the vessel and crew as piratical at the moment of capture. Had they even been seized while in the act of landing the passengers the business in which they would have been engaged would not have amounted to piracy. The element of violence would have been wanting. Invasion is in itself an act of violence. But an invasion does not take place when a hundred men land in a country without means of seriously defending themselves, and when their only immediate object is to join their fellow rebels quietly and without observation. The British government demanded and obtained compensation for the families of the British subjects who were executed. In their correspondence

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with the government of Spain they did not complain of the seizure of the vessel, or of the detention of the passengers and crew, but argued that after this had been effected 'no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners;' maintaining further that had this been done it would have been found that 'there was no charge either known to the Law of Nations or to any municipal law under which persons in the situation of the British crew of the *Virginius* could have been justifiably condemned to death[1].'

By the municipal law of many countries acts are deemed piratical and are punished as such which are not reckoned piratical by international law. Thus the slave trade is piratical in England and the United States; and in France the crew of an armed vessel navigating in time of peace with irregular papers become pirates upon the mere fact of irregularity without the commission of any act of violence. It is scarcely necessary to point out that municipal laws extending piracy beyond the limits assigned to it by international custom affect only the subjects of the state enacting them and foreigners doing the forbidden acts within its jurisdiction.

[1] Parl. Papers, lxxvi. 1874.

CHAPTER VII

SELF-PRESERVATION

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Right of self-preservation in general.

IN the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary; and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles. If such suspension is necessary for existence, the general right is enough; if it is not strictly necessary, the occasion is hardly one of self-preservation. There are however circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved. This class of cases is not only susceptible of being brought under distinct rules, but evidently requires to be carefully defined, lest an undue range should be given to it.

Permissible action within foreign territory against individuals

The simplest form of the occasions on which the right of self-preservation, in its more limited sense, arises is offered when, on an overt attack being made upon a state by persons enjoying the protection afforded by the territory of another state, it is useless either from the suddenness of the attack or from other causes to

PART II CHAP. VII making it a starting-point for attack.

call upon the state which serves as a cover for the act to preserve its neighbour from injury. The attacked state takes upon itself to exercise authority or violence within the territory of the other state, and thereby violates the sovereignty of the latter; it consequently does an act which is *primâ facie* hostile, and which can only be divested of the character of hostility by the urgency of the reason for it, and by an evident absence of hostile intention. The conditions of permissible action are therefore, first, that the danger shall be so great and immediate, or so entirely beyond the control of the government of the country which is used by the invaders, that a friendly state may reasonably be expected to consider it more important that the attacked state shall be protected than that its own rights of sovereignty shall be maintained untouched, and secondly, that the acts done by way of self-protection shall be limited to those which are barely necessary for the purpose [1].

Case of the *Caroline.*

An instance in which the right of self-preservation was exercised in this manner happened during the Canadian rebellion of 1838 [2]. A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots

[1] Phillimore, i. §§ ccxiii–v; Vattel, liv. iii. ch. vii. § 133; Klüber, § 44; Twiss, i. § 102.

Some writers, while admitting the right of self-protection by means of acts violating the sovereignty of another state, deny that it is a pacific right, and class acts done in pursuance of it with operations of 'imperfect war,' 'any invasion of state territory being' necessarily 'an act of hostility, which may be repelled by force.' (Halleck, i. 95; Calvo, §§ 203–4.) It is no doubt open to a state to treat any violation of its territory as an act of war; but a violation of the nature described is not hostile in intention, it may indeed be committed with the express object of preventing occurrences which would lead to war, and it is not directed against the state, or against persons or property belonging to it because they belong to it, but against specific ill-doers because of their personal acts; it therefore differs in very important respects from ordinary acts of war, and it is wholly unnecessary to consider it to be such until the state, of which the territory is violated, elects to regard the acts done in a hostile light.

[2] Cf. antea, p. 218 n.

were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the *Caroline*. To prevent the crossing from being effected, the *Caroline* was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara. The cabinet of Washington complained of the violation of territory, and called upon the British government 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.' There was no difficulty in satisfying the requirements of the United States, which though perhaps expressed in somewhat too emphatic language, were perfectly proper in essence. There was no choice of means, because there was no time for application to the American government; it had already shown itself to be powerless; and a regiment of militia was actually looking on at the moment without attempting to check the measures of the insurgents. Invasion was imminent; there was therefore no time for deliberation. Finally, the action which was taken was confined to the minimum of violence necessary to deprive the invaders of their means of access to British territory. After an exchange of notes the matter was dropped by the government of the United States, which must have felt that it would have been placed in a position of extreme gravity if the English authorities had allowed things to take their course, and had then held it responsible for consequences, to the production of which long-continued negligence on its part would have been largely contributory[1].

As the measures taken when a state protects itself by violating

[1] Mr. Webster to Mr. Fox, April 24, 1841; and Lord Ashburton to Mr. Webster, July 28, 1842. Parl. Papers, 1843, lxi. 46-51.

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Limitations upon the right of action.

the sovereignty of another are confessedly exceptional acts, beyond the limits of ordinary law, and permitted only for the supreme motive of self-preservation, they must evidently be confined within the narrowest limits consistent with obtaining the required end. It is therefore more than questionable whether a state can use advantages gained by such measures to do anything, beyond that which is necessary for immediate self-protection, which it would not otherwise be in a position to do. If, for example, subjects starting from foreign territory to invade the state are captured in the foreign territory in question, in the course of preventive operations, there can be no doubt on the one hand that they can be kept prisoners until the immediate danger is over, but it is evident on the other that they cannot be put upon their trial, or punished for treason, however complete the crime may be, in the same manner as if they had been captured within the state itself.

Permissible action against states which are not free agents.

The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within it. The case, though closely analogous to that already mentioned, so far differs from it that action, instead of being directed against persons whose behaviour it may be presumed is not sanctioned by the state, is necessarily directed against the state itself. The state must be rendered harmless by its territory being militarily occupied, or by the surrender of its armaments being extorted. Although therefore the measures employed may be consistent with amity of feeling, it is impossible to expect, as in the former case, that a country shall consider it more important that the threatened state shall be protected than that its own rights of sovereignty shall be maintained intact, and while the one state may do what is necessary for its own preservation, the

other may resent its action, and may treat it as an enemy. So long however as this does not occur, and war in consequence does not break out, the former professes that its operations are of a friendly nature; it is therefore strictly limited to such action as is barely necessary for its object, and it is evidently bound to make compensation for any injury done by it[1].

English operations against Denmark, 1807.

The most remarkable instance of action of the kind in question is that which is presented by the English operations with respect to Denmark in 1807. At that time the Danes were in possession of a considerable fleet, and of vast quantities of material of naval construction and equipment; they had no army capable of sustaining an attack from the French forces then massed in the north of Germany; it was provided by secret articles in the Treaty of Tilsit, of which the British government was cognizant, that France should be at liberty to take possession of the Danish fleet and to use it against England; if possession had been taken, France 'would have been placed in a commanding position for the attack of the vulnerable parts of Ireland, and for a descent upon the coasts of England and Scotland;' in opposition, no competent defensive force could have been assigned without weakening the Mediterranean, Atlantic, and Indian stations to a degree dangerous to the national possessions in those regions; the French forces were within easy striking distance, and the English government had every reason to expect that the secret articles of the Treaty of Tilsit would be acted upon. Orders were in fact issued for the entry of the corps of Bernadotte and Davoust into Denmark before Napoleon became aware of the

[1] Grotius (De Jure Belli et Pacis, lib. ii. c. ii. § 10) gives the occupation of neutral territory, under such circumstances as those stated, as an illustration of the acts permissible under his law of necessity; and the doctrine of Wolff (Jus Gentium, § 339), Lampredi (Jur. Pub. Univ. Theorem. pt. iii. cap. vii. § 4), Klüber (§ 44), Twiss (i. § 102), &c., covers the view expressed in the text; its best justification however is that the violation of the rights of sovereignty contemplated by it is not more serious, and is caused by far graver reasons, than can be alleged in support of many grounds of defensive intervention, which have been acted upon, and have been commonly accepted by writers. For defensive intervention, see postea, pp. 285–6.

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despatch, or even of the intended despatch, of an English expedition. In these circumstances the British government made a demand, the presentation of which was supported by a considerable naval and military force, that the Danish fleet should be delivered into the custody of England; but the means of defence against French invasion and a guarantee of the whole Danish possessions were at the same time offered, and it was explained that 'we ask deposit—we have not looked for capture; so far from it, the most solemn pledge has been offered to your government, and it is hereby renewed, that, if our demand be acceded to, every ship of the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag.' The emergency was one which gave good reason for the general line of conduct of the English government. The specific demands of the latter were also kept within due limits. Unfortunately Denmark, in the exercise of an indubitable right, chose to look upon its action as hostile, and war ensued, the occurrence of which is a proper subject for extreme regret, but offers no justification for the harsh judgments which have been frequently passed upon the measures which led to it[1].

Permissible action in non-territorial waters.

If acts of the foregoing kind are allowed, *a fortiori* acts are also permitted which constitute less direct infringements of the sovereignty and independence of foreign states. A country the peace of which is threatened by persons on board vessels sailing under the flag of another state may in an emergency search and capture such vessels and arrest the persons on board, notwithstanding that as a general rule there is no right of visiting

[1] Alison, Hist. of Europe, vi. 474–5; De Garden, Hist. des Traités de Paix, x. 238–43 and 325–31. Writers who still amuse themselves by repeating the attacks upon the conduct of England, which were formerly common, might read with profit the account of the transaction given by the best French historian who has dealt with the Napoleonic period (Lanfrey, Hist. de Napoléon 1er, iv. 146–9) [and the comments on the English policy by Captain Mahan of the U. S. Navy, 'Influence of Sea Power upon the French Revolution and Empire,' ii. 277].

and seizing vessels of a friendly power in time of peace upon the seas. That the act is somewhat less violent a breach of ordinary rule than the acts hitherto mentioned does not however render laxity of conduct permissible, or exonerate a state if the grounds of its conduct are insufficient. As in other cases the danger must be serious and imminent, and prevention through the agency of the state whose rights are disregarded must be impossible.

Case of the *Virginius*. A case of which some account has already been given with reference to another point illustrates the different views which may be held as to the circumstances under which protective action of the kind under consideration is legitimate; and it also opens a question whether a state may not have a power of dealing more freely with subjects captured at sea than with such as may be taken prisoners on the soil of a foreign state. It will be remembered that in 1873 the *Virginius*, a vessel registered as the property of an American citizen, but in fact belonging to certain Cuban insurgent leaders, attempted to land upon the island some men, among whom were persons of importance. The vessel was captured when making for Cuba, but while still a considerable distance outside territorial waters; and the Spaniards, besides doing illegal acts which are not to the present point, executed the insurgents on board. Whether the danger was sufficient to justify the seizure of the vessel at the moment when it was effected may, to say the least, be doubtful; but assuming urgent danger to have existed, was its capture in other respects permissible, and had the Spanish authorities a right to punish insurgent subjects taken on board? The United States maintained that the fact that the *Virginius* was *primâ facie* an American vessel was enough to protect her from interference of any kind outside territorial waters. 'Spain,' argued the Attorney-General in his opinion, 'no doubt has a right to capture a vessel with an American register and carrying the American flag, found on her own waters, assisting or endeavouring to assist the insurrection in Cuba, but she has no right to capture such a vessel on the

high seas on an apprehension that in violation of the neutrality or navigation laws of the United States, she was on the way to assist such rebellion. Spain may defend her territory and people from the hostile attack of what is or appears to be an American vessel; but she has no jurisdiction whatever on the question as to whether or not such vessel is on the high seas in violation of any law of the United States[1].' In taking up this position the United States in effect denied the right of doing any acts of self-protection upon the high seas in time of peace in excess of ordinary peace rights. In the end, however, the question between it and the Spanish government was settled on the ground that the ship was not duly invested with an American national character, according to the requirements of the municipal law of the United States, so that much of what the latter country had contended for was surrendered. If a vessel fraudulently carrying a national flag may be seized, the right of visit and search to establish the identity of the ship and to substantiate the suspicion of fraud must be conceded; the broad ground that the *primâ facie* character of the ship covers it with an absolute protection has been abandoned. And when once it is granted that the means necessary to bring fraud to light may be taken, and that a ship fraudulently carrying a national flag may be seized, it would seem somewhat pedantic to say that where clear evidence of hostile intention is found on board a vessel it is to be released, however imminent the danger, if it is discovered that the suspicion of fraud is not justified, and that the ship is really a vessel of its professed country, but engaged in an unlawful act which its own government would be bound to prevent if possible. Unless the principle upon which the whole of the present chapter is founded is incorrect it must be unnecessary for a threatened state, if imminently and seriously threatened, to trouble itself with such refinements. Apparently this was the view taken by the English government, which

[1] Parl. Papers, lxxvi. 1874, 65; and see President's Message of January 6, 1874, ib. 72.

became mixed up in the affair through the presence of Englishmen on board the *Virginius* as part of the crew. In demanding reparation for the death of some of them who were executed it does 'not take the ground of complaining of the seizure of the *Virginius*, nor of the detention of the passengers and crew . . . Much may be excused,' it was added with reference to their deaths, 'in acts done under the expectation of instant damage in self-defence by a nation as well as by an individual. But after the capture of the *Virginius* and the detention of the crew was effected, no pretence of imminent necessity of self-defence could be alleged[1].' It is clear from this language that the mere capture of the vessel was an act which the British government did not look upon as being improper, supposing an imminent necessity of self-defence to exist.

Due treatment of subjects captured in foreign vessels in non-territorial waters.

The fate of the insurgents who were captured and executed was not made a question between the English and American governments on the one hand and that of Spain on the other, and no international discussion appears to have taken place with regard to other cases—if other cases have occurred—of subjects captured under like circumstances. General principles of law therefore are the only guide by the help of which the rights of a state over such persons can be arrived at. Looked at by their light the matter would seem to stand thus. Although a merchant ship is not part of the territory of the state to which she belongs, under ordinary circumstances she remains while upon non-territorial waters under the jurisdiction of her own state exclusively; permission to another state to do such acts as may be necessary for self-preservation cannot be supposed in any case to imply a cession of more jurisdiction than is barely necessary for the purpose, and when, as in the present case, no cession of criminal jurisdiction is required, none can be presumed to be made; whether therefore the conduct of persons on board is criminal, and in what sense or to what degree, must be tested by reference to the laws of the state to which the vessel belongs,

[1] Parl. Papers, lxxvi. 1874, 85.

and they ought to be judged by its tribunals. The powers of their own state would seem therefore to be limited to keeping them in custody so long as may be necessary for its safety, and to handing them over afterwards to the state owning the vessel for trial and punishment under any municipal laws which they may have broken by making attacks upon a friendly country. On principle the powers of the capturing state would seem to be no greater over persons captured on non-territorial seas than over persons seized in foreign territory; and the conduct of the Spanish authorities, in shooting the insurgents taken on board the *Virginius*, might have been seriously arraigned by the United States, had the latter country chosen to do so[1].

Protection of subjects abroad.

States possess a right of protecting their subjects abroad which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions; they have the right, that is to say, to exact reparation for maltreatment of their subjects by the administrative agents of a foreign government if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain; and they have the right to require that, as between their subjects and other private individuals, the protection of the state and the justice of the courts shall be afforded equally, and

[1] The British government, in complaining of the execution of British members of the crew after sentence by court martial, said that 'it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners.' On any principle too much seems to have been conceded in saying this. Whether or not there can be any doubt as to whether a subject of the state, unquestionably guilty of a crime against it, can be punished when he has been seized within foreign jurisdiction, it is impossible to admit that foreigners seized under like circumstances may be put upon their trial; properly until they enter a state they can commit no crime cognizable by it (comp. antea, p. 210). As the *Virginius* was an unarmed ship, and no resistance could consequently be made, it is difficult to see that the Spanish authorities would have had a right to do more than try the foreign crew 'in proper form of law,' if she had been captured within territorial waters, and in the act of landing her passengers;—a presumption, where a vessel is unarmed, must always exist in favour of the innocence or ignorance of the crew, which can only be destroyed by evidence more carefully sifted than it is likely to be before a court martial.

that compensation shall be made if the courts from corruption or prejudice or other like causes are guilty of serious acts of injustice. Broadly, all persons entering a foreign country must submit to the laws of that country; provided that the laws are fairly administered they cannot as a rule complain of the effects upon themselves, however great may be the practical injustice which may result to them; it is only when those laws are not fairly administered, or when they provide no remedy for wrongs, or when they are such, as might happen in very exceptional cases, as to constitute grievous oppression in themselves, that the state to which the individual belongs has the right to interfere in his behalf[1]. When an injury or injustice is committed by the government itself, it is often idle to appeal to the courts; in such cases, and in others in which the act of the government has been of a flagrant character, the right naturally arises of immediately exacting reparation by such means as may be appropriate.

It is evident that the legitimacy of action in any given case and the limits of right action if redress be denied, are so essentially dependent on the particular facts of the case that it is useless, taking the question as a whole, to go beyond the very general statement of principle which has been just made. A single case may however be mentioned, to illustrate the delicacy of the questions to which the position of subjects in foreign countries may give rise. A Mr. Rahming, a British subject and commission agent in New York, was arrested during the American civil war, and consigned to military custody, on a charge of

[1] Phillimore, ii. §§ ii–iii; Bluntschli, §§ 380, 386; Calvo, § 361. The latter writer (§ 362) narrates a dispute which took place between England and Prussia as an illustrative case. The question at issue was the conduct of a certain criminal court in the latter country, before which an English subject was brought. As M. Calvo has given the name of the accused person, as from the date of the occurrence the latter is very likely to be still alive, and as the affair would have been highly discreditable to him if M. Calvo's account bore any resemblance to the facts, it is to be regretted that M. Calvo did not take the precaution of looking into the English Blue Book (Parl. Papers, 1861, lxv), where the most complete materials for forming an accurate judgment are provided. Had he done so, the story would have assumed a very different aspect in his pages.

having endeavoured to persuade the owners of a vessel wrecked six months before, to import cannon into Wilmington at some time or other before the wreck took place. A writ of habeas corpus was applied for and granted; but obedience to it was refused by the commandant of Fort McHenry under orders from the executive government, and in answer to a complaint on the part of Lord Russell, that 'the military authorities refuse to pay obedience to, or indeed to notice, a writ of habeas corpus,' Mr. Seward alleged that the President had the right of suspending the writ whenever in his opinion the public safety demanded that measure. The Supreme Court so little shared this view that it issued an attachment against the commandant. Lord Russell nevertheless forebore to press his remonstrances[1]. As Mr. Rahming was ultimately liberated on executing a bond, with condition that he should do no act hostile to the United States, the conduct of Lord Russell was no doubt judicious. Had he however been kept in custody, the question would have arisen whether a state is bound to abstain from interference on behalf of a subject, so soon as constitutional authority is claimed for an act, whether there be reason to believe that the claim is well or ill founded. Certainly, as a general rule, a foreign government must take its information as to the functions of the different organs of a state from that one which is duly charged with the conduct of foreign relations. To make this rule absolute however would place foreign subjects at the mercy of a ruler able and willing to violate the law; and a sovereign, if bound to abandon his subjects to any moderately reasonable law, however hardly it may press on them, is not bound to allow them to be treated in defiance of law, even though they may be so treated in common with all the other inhabitants of the territory in which they are. In the particular case the authority of the Supreme Court was undoubtedly superior to that of the Executive.

Protection with respect to debts due

There is one general point upon which a few words may be added. It has become a common habit of governments,

[1] Parl. Papers, North America, i. 1862.

especially in England, to make a distinction between complaints of persons who have lost money through default of a foreign state in paying the interest or capital of loans made to it and the complaints of persons who have suffered in other ways. In the latter case, if the complaint is thought to be well founded, it is regarded as a pure question of expediency on the facts of the particular case or of the importance of the occurrence whether the state shall interfere, and if it does interfere, whether it shall confine itself to diplomatic representations, or whether, upon refusal or neglect to give redress, it shall adopt measures of constraint falling short of war, or even resort to war itself. In the former case, on the other hand, governments are in the habit of refusing to take any steps in favour of the sufferers, partly because of the onerousness of the responsibility which a state would assume if it engaged as a general rule to recover money so lost, partly because loans to states are frequently, if not generally, made with very sufficient knowledge of the risks attendant on them, and partly because of the difficulty which a state may really have, whether from its own misconduct or otherwise, in meeting its obligations at the time when it makes default. Fundamentally however there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrong-doer, is immediately responsible. The difference which is made in practice is in no sense obligatory; and it is open to governments to consider each case by itself and to act as seems well to them on its merits[1].

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[1] The policy which has been pursued by England was laid down in 1848 by Lord Palmerston in the following terms, in a circular addressed to the British representatives in foreign states:—

'Her Majesty's government have frequently had occasion to instruct her Majesty's representatives in various foreign states to make earnest and friendly, but not authoritative representations, in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities of those states.

'As some misconception appears to exist in some of those states with regard to the just right of her Majesty's government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to

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When the subject of a state is not merely passing through, or temporarily resident in, a foreign country, but has become domiciled there, the right of his state to protect him is somewhat affected. He has deliberately made the foreign country the chief seat of his residence; for many purposes, as will be seen

inform you, as the representative of her Majesty in one of the states against which British subjects have such claims, that it is for the British government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained; and if the government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

'It is therefore simply a question of discretion with the British government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

'It has hitherto been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

'For the British government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by governments of known good faith and ascertained solvency. But nevertheless it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation.' (Quoted by Phillimore, ii. § v.) A short time previously Lord Palmerston, in answer to a question in the House of Com-

later[1], he has become identified with it; he must be supposed to obtain some advantages from this intimacy of association, since its existence is dependent on his own act; it would be unreasonable that he should be allowed to reap these advantages on the one hand, and that on the other he should retain the special advantages of a completely foreign character. To what degree the right of a government to protect a subject is thus modified it is at present impossible to say with any precision in the abstract; but the rule is one which can in general be probably applied without much difficulty to individual cases.

mons, indicated that under certain circumstances he might be prepared to go to the length of using force. The doctrine and the principles of policy laid down in Lord Palmerston's circular were more lately reaffirmed by Lord Salisbury. See the *Times* of January 7, 1880.

[1] Pt. iii. chap. vi.

CHAPTER VIII

INTERVENTION

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The equivocal character of intervention.

INTERVENTION takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. *Primâ facie* intervention is a hostile act, because it constitutes an attack upon the independence of the state subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the state intruded upon it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening power it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. In the case moreover of intervention in the internal affairs of a state, it is generally directed only against a party within the state, or against a particular form of state life, and it is frequently carried out in the interest of the government or of persons belonging to the invaded state. It is therefore compatible with friendship towards the state as such, and it may be a pacific measure, which becomes war in the intention of its authors only when resistance is offered, not merely by persons within the state and professing to represent it, but by the state through the persons whom the invading power chooses to look upon as its authorised agents. Hence although intervention often ends in war, and is sometimes really war from the commencement, it may be conveniently considered abstractedly from the pacific or belligerent character which it assumes in different cases.

It may also be worth while to simplify the discussion of the subject by avoiding express reference to intervention as between different states, all questions relating to the conditions under which such intervention may take place being covered by the principles applicable in the more complex case of intervention in the internal affairs of a single state.

General conditions of the legality of intervention.

It has been seen that though as a general rule a state lies under an obligation to respect the independence of others, there are rights which may in certain cases take precedence of the right of independence, and that in such cases it may be disregarded if respect for it is inconsistent with a due satisfaction of the superior right[1]. The permissibility of an infringement of the right of independence being thus dependent upon an incompatibility of respect for it with a right which may claim priority over it, the legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it. That this may sometimes be done is undisputed; but the right of independence is so fundamental a part of international law, and respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavour, and any general grounds of intervention pretending to be sufficient, no less than their application in particular cases, may properly be judged with an adverse bias.

Classification of the grounds upon which intervention has taken place, or which are alleged to be sufficient.

The grounds upon which intervention has taken place, or upon which it is said with more or less of authority that it is permitted, may be referred to the right of self-preservation, to a right of opposing wrong-doing, to the duty of fulfilling engagements, and to friendship for one of two parties in a state.

Self-preservation.

Interventions for the purpose of self-preservation naturally include all those which are grounded upon danger to the institutions, to the good order, or to the external safety of the intervening state.

[1] See antea, pp. 53 et seq.

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To some of these no objection can be offered. If a government is too weak to prevent actual attacks upon a neighbour by its subjects, if it foments revolution abroad, or if it threatens hostilities which may be averted by its overthrow, a menaced state may adopt such measures as are necessary to obtain substantial guarantees for its own security. The state which is subjected to intervention has either failed to satisfy its international duties or has intentionally violated them. It has done or permitted a wrong, to obtain redress for which the intervening state may make war if it chooses. If war occurs the latter may exact as one of the conditions of peace at the end that a government shall be installed which is able and willing to observe its international obligations. And if the intervening state may make war, *a fortiori* it may gain the same result in a milder way. When however the danger against which intervention is levelled does not arise from the acts or omissions of the state, but is merely the indirect consequence of the existence of a form of government, or of the prevalence of ideas which are opposed to the views held by the intervening state or its rulers, intervention ceases to be legitimate. To say that a state has a right to ask a neighbour to modify its mode of life, apart from any attempt made by it to propagate the ideas which it represents, is to say that one form of state life has a right to be protected at the cost of the existence of another; in other words, it is to ignore the fundamental principle that the right of every state to live its life in a given way is precisely equal to that of another state to live its life in another way. The claim besides is essentially inequitable in other respects. Morally a state cannot be responsible for the effect of example upon the minds of persons who are not under its control, and whom it does not voluntarily influence. If the intervening state is imperilled, its danger comes from the spontaneous acts of its own subjects or of third parties, and it is against them that it must direct its precautions[1].

[1] De Martens, Précis, § 74; Wheaton, Elem. pt. ii. ch. i. § 3; Phillimore, i. §§ ccclxxxvii–viii and cccxcii; Halleck, i. 83, quoting a speech of Chateau-

Intervention to preserve rights of succession.

Intervention to hinder internal changes in a state from prejudicing rights of succession or of feudal superiority possessed by the intervening state is recognised as legitimate by some writers. Unquestionably, in the abstract, if provision is made by treaty for the union of one state with another upon the occurrence of certain contingencies, the state to which the right of succession belongs is justified in taking whatever measures may be necessary to protect its reversionary interests. A state may of course contract itself out of its common law rights. In agreeing to invest another state with rights over itself, whether contingent on the extinction of its ruling family or on anything else, it must be held to have surrendered its right of dealing with itself in matters affecting the reversion which it has granted; and though the engagements into which it has entered may in time become extremely onerous, and it may be morally justified in endeavouring to escape from them, it has obviously no reason to expect the state with which it has contracted to consent upon such grounds to a rescission of the agreement. But it must be remembered that the arrangements of this nature which have been usually made have either been family compacts between proprietary sovereigns, or have been designed to provide rather for the succession of a family than of a state. In such cases the permissibility of intervention can hardly be conceded. International law no longer recognises a patrimonial state. A country is not identified with its sovereign. He is merely its organ for certain purposes, and it has no right to interfere for an object which is personal to him. The question of the permissibility of

briand upon the French intervention in Spain in 1823, as stating the rule clearly, and i. 465; Bluntschli, § 474 note, and § 478; Mamiani, 100–1; Fiore, i. 421–55. Calvo (§§ 141–2) adheres to the principles stated by Lord Castlereagh in his circular of the 19th January, 1821. British and Foreign State Papers, 1820–1, p. 1160. Vattel, liv. ii. ch. iv. §§ 54 and 57, ignores self-preservation as a ground of intervention, but admits the adequacy of the weaker reason of oppression by a tyrannical sovereign, § 56. Heffter, §§ 30–1 and 44–5, while also sanctioning intervention on more doubtful grounds, limits what may be done under that of self-preservation to negotiation or to the establishment at most of a military cordon.

intervention must in fact depend upon whether, at the time of the arrangement being made upon which intervention is based, it was intended by both states that in the contingency contemplated a union should be effected irrespectively of the form of government or of the persons composing the government of the state owning the succession. If this was not intended, the engagement, whether implied or expressed, is not one entered into by the states but by individuals, who from their position have the opportunity of giving to their personal agreements the form of a state act; and it then only becomes possible to answer in one way the question put by Sir R. Phillimore, who asks whether it can be denied that when 'a state, having occupied for a long period the position of a free and independent nation in the society of other states, thinks fit to secure its constitution, and to pass a fundamental law, similar to that by which Great Britain excluded James II and his descendants from her throne, that no Prince of a certain race shall be henceforth their ruler, the exercise of such a power is inherent in the nature of an independent state[1].'

Interventions in restraint of wrong-doing:

Interventions which have for their object to check illegal intervention by another state are based upon the principle that a state is at liberty to oppose the commission of any act, which in the eye of the law is a wrong; and the frequent interventions which have taken place upon the real or pretended grounds of humanity and religion must be defended, in so far as they can be defended at all, upon the same principle, coupled with the assumption that international law forbids the conduct of rulers to their subjects, and of parties in a state towards each other, which such interventions are intended to repress.

[1] Phillimore, i. § cccc; De Martens, Précis, § 75; Heffter, § 45; Bluntschli, § 479. The latest occasions on which any question of intervention on the above ground seems to have arisen were in 1849, when, according to Phillimore, Austria meditated, but did not carry out, an intervention in Tuscany; and in 1860, when Spain appears to have intervened diplomatically on behalf of the Duchess of Parma, on the occasion of the annexation of Parma to the kingdom of Italy by a popular vote.

1. against illegal acts;

It has already been seen that the existence of a right to oppose acts contrary to law, and to use force for the purpose when infractions are sufficiently serious, is a necessary condition of the existence of an efficient international law. It is incontestable that a grave infraction is committed when the independence of a state is improperly interfered with; and it is consequently evident that another state is at liberty to intervene in order to undo the effects of illegal intervention, and to restore the state subjected to it to freedom of action[1].

2. against immoral acts.

Interventions of the second kind stand in a very different position. International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution, are acts which have nothing to do directly or indirectly with such relations. On what ground then can international law take cognizance of them? Apparently on one only, if indeed it be competent to take cognizance of them at all. It may be supposed to declare that acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a public scandal, which the body of states, or one or more states as representative of it, are competent to suppress. The supposition strains the fiction that states which are under international law form a kind of society to an extreme point, and some of the special grounds, upon which intervention effected under its sanction is based, are not easily distinguishable in principle from others which modern opinion has branded as unwarrantable. To some minds the excesses of a revolution would seem more scandalous than the tyranny of a sovereign. In strictness they ought, degree for degree, to be precisely equivalent in the eye of the law. While however it is settled

[1] Heffter, § 96; Mamiani, 104; Bluntschli, § 479. Fiore (i. 445) considers international law to be 'sotto la protezione di tutti gli stati associati. Il dovere della tutela giuridica importa da parte dei medesimi l'obbligo d'intervenire per ripristinare l'autorità del diritto se fosse lesa per parte di uno o di più stati.'

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that as a general rule a state must be allowed to work out its internal changes in its own fashion, so long as its struggles do not actually degenerate into internecine war, and intervention to put down a popular movement or the uprising of a subject race is wholly forbidden, intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious oppression, short of a cruelty which would rank as tyranny, has ceased to be recognised as an independent ground of intervention, but it is still used as between Europe and the East as an accessory motive, which seems to be thought by many persons sufficiently praiseworthy to excuse the commission of acts in other respects grossly immoral. Not only in fact is the propriety or impropriety of an intervention directed against an alleged scandal judged by the popular mind upon considerations of sentiment to the exclusion of law, but sentiment has been allowed to influence the more deliberately formed opinions of jurists. That the latter should have taken place cannot be too much regretted. In giving their sanction to interventions of the kind in question jurists have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law; of which the principle is not even intended to be equally applied to the cases covered by it; and which by the readiness with which it lends itself to the uses of selfish ambition becomes as dangerous in practice as it is plausible in appearance.

It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or unless the whole body of civilised states have concurred in authorising it. Interventions, whether armed or diplomatic, undertaken either for the reason or upon the pretexts of cruelty, or oppression, or the horrors of a civil war, or whatever the reason put forward, supported in reality by the justification which such facts offer to the popular

mind, would have had to justify themselves, when not authorised by the whole body of civilised states accustomed to act together for common purposes, as measures which, being confessedly illegal in themselves, could only be excused in rare and extreme cases in consideration of the unquestionably extraordinary character of the facts causing them, and of the evident purity of the motives and conduct of the intervening state. The record of the last hundred years might not have been much cleaner than it is; but evil-doing would have been at least sometimes compelled to show itself in its true colours; it would have found more difficulty in clothing itself in a generous disguise; and international law would in any case have been saved from complicity with it[1].

[1] The opinions of the modern international jurists who touch upon humanitarian intervention are very various, and for the most part the treatment which the subject receives from them is merely fragmentary, notice being taken of some only of its grounds, which are usually approved or disapproved of without very clear reference to a general principle. Vattel (liv. i. ch. iv. § 56) considers it permissible to succour a people oppressed by its sovereign, but does not appear to sanction any of the analogous grounds of intervention. Wheaton (Elem. pt. ii. ch. i. § 9), Bluntschli (§ 478), Mamiani (p. 86), give the right of aiding an oppressed race. Heffter (§ 46), while denying the right of intervention to repress tyranny, holds that so soon as civil war has broken out a foreign state may assist either party engaged in it. Calvo (§ 166) and Fiore (i. 446) think that states can intervene to put an end to crimes and slaughter. Mamiani (112), on the other hand, refuses to recognise intervention on this ground. 'Per vero,' he says, 'a qual diritto positivo degli altri popoli è recata ingiuria? Udiste mai alcuno che affermi essere nell' uomo il diritto di non avere dinanzi agli occhi se non buoni modelli di virtù, e vivere tra cittadini nelle cui abitazioni non si commettano eccessi d'alcuna sorta e i quali tutti professino opinioni vere e ammodate?' The reason is doubtfully admitted by Phillimore (i. § cccxciv) and Halleck (i. 465) as accessory to stronger ones, such as self-defence or the duties of a guarantee. Phillimore (i. §§ ccccii–iv) is the only writer who seems to sanction intervention on the ground of religion.

A circular issued by the Russian government, when England and France suspended diplomatic relations with Naples in consequence of the inhumanity with which the kingdom was ruled, is not without value in itself, and is of especial interest as issuing from the source from which it came. 'We could understand,' it says, 'that as a consequence of friendly forethought one government should give advice to another in a benevolent spirit, that such advice might even assume the character of exhortation; but we believe that to be the furthest limit allowable. Less than ever can it now be allowed in

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Intervention under a treaty of guarantee.

It may perhaps at one time have been an open question whether a right or a duty of intervention could be set up by a treaty of guarantee binding a state to maintain a particular dynasty or a particular form of government in the state to which the guarantee applied. But the doctrine that intervention on this ground is either due or permissible involves the assumption that independent states have not the right to change their government at will, and is in reality a relic of the exploded notion of ownership on the part of the sovereign. According to the views which are now held as to the relation of monarchical or other governments to the states which they represent, no case could arise under which a treaty of the sort could be both needed and legitimate. As against interference by a foreign power the general right of checking illegal intervention is enough to support counter interference; and as against a domestic movement it is evident that a contract of guarantee is made in favour of a party within the state and not of the state as a whole, that it therefore amounts to a promise of illegal interference, and that being thus illegal itself, it cannot give a stamp of legality to an act which without it would be unlawful [1].

Europe to forget that sovereigns are equal among themselves, and that it is not the extent of territory, but the sacred character of the rights of each which regulates the relations that exist between them. To endeavour to obtain from the King of Naples concessions as concerns the internal government of his state by threats, or by a menacing demonstration, is a violent usurpation of his authority, an attempt to govern in his stead; it is an open declaration of the right of the strong over the weak.' Martin, Life of the Prince Consort, iii. 510.

[1] Some treaties, e. g. the Treaties in 1713, by which Holland, France, and Spain guaranteed the Protestant succession in England (Dumont, viii. i. 322, 339, 393), and the Final Act of the Germanic Confederation, arts. 25 and 26 (De Martens, Nouv. Rec. v. 489), contain guarantees which clearly extend to cases arising out of purely internal troubles; most treaties of guarantee however are directed against the possible action of foreign powers. Twiss (i. § 231) and Halleck (i. 85) deny the right of intervention under a treaty of guarantee. Taking what Vattel (liv. ii. ch. xii. §§ 196–7) says as a whole he may probably be understood to express the same doctrine. Phillimore (ii. § lvi) appears to be somewhat doubtful. De Martens (Précis, § 78), Klüber (§ 51), and Heffter (§ 45) allow intervention under a treaty of guarantee.

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Intervention by invitation of a party to a civil war.

It is generally said, and the statement is of course open to no question, that intervention may take place at the invitation of both parties to a civil war. But it is also sometimes said, even by modern writers, that interventions carried out at the invitation of one only of the two parties are not always illegal. They are permitted, for example, both by M. Bluntschli and M. Heffter[1]. The former of these writers concedes a right of intervention on behalf of an established government, for so long as it may be considered the organ and representative of the state; and the latter grants it in favour of whichever side appears to be in the right. It is hard to see by what reasoning these views can be supported. As interventions, in so far as they purport to be made in compliance with an invitation, are independent of the reasons or pretexts which have been already discussed, it must be assumed that they are based either on simple friendship or upon a sentiment of justice. If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the rights of independence. Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way. Supposing it on the other hand to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If, again, intervention is based upon an opinion as to the merits of the question at issue, the intervening state takes upon itself to pass

[1] Bluntschli, §§ 476-7; Heffter, § 46. See also Vattel, liv. ii. ch. iv. § 56. Phillimore (i. § cccxcv) considers that intervention upon the application of one party to a civil war 'can hardly be asserted to be at variance with any abstract principle of international law, while it must be admitted to have received continual sanction from the practice of nations.' Halleck (i. 87) on the other hand holds what might seem the obvious truth that an invitation 'from only one of the contestants can by itself confer no rights whatever as against the other party.' Mamiani (p. 85) places the matter on its right footing.

judgment in a matter which, having nothing to do with the relations of states, must be regarded as being for legal purposes beyond the range of its vision.

Intervention under the authority of the body of states.

A somewhat wider range of intervention than that which is possessed by individual states may perhaps be conceded to the body of states, or to some of them acting for the whole in good faith with sufficient warrant. In the general interests of Europe, for example, an end might be put to a civil war by the compulsory separation of the parties to it, or a particular family or a particular form of government might be established and maintained in a country, if the interests to be guarded were strictly international, and if the maintenance of the state of things set up were a reasonable way of attaining the required object.

If a practice of this kind be permissible, its justification must rest solely upon the benefits which it secures. The body of states cannot be held to have a right of control, outside law, in virtue of the rudimentary social bond which connects them. More perfectly organised societies are contented with enforcing the laws that they have made; in doing this they consider themselves to have exhausted the powers which it is wise to assume; they do not go on to impose special arrangements or modes of life upon particular individuals; beyond the limits of law, direct compulsion does not take place; and evidently the community of states cannot in this respect have larger rights than a fully organised political society.

Is then such intervention justified by its probable or actual results? Certainly there must always be a likelihood that powers with divergent individual interests, acting in common, will prefer the general good to the selfish objects of a particular state. It is not improbable that this good may be better secured by their action than by free scope being given to natural forces. In one or two instances, as, for example, in that of the formation of Belgium, and in the recent one of the arrangements made by the Congress of Berlin, and of the minor interventions springing

out of it, settlements have been arrived at, or collisions have been postponed, when without common action an era of disturbance might have been indefinitely prolonged, and its effects indefinitely extended. There is fair reason consequently for hoping that intervention by, or under the sanction of, the body of states on grounds forbidden to single states, may be useful and even beneficent. Still, from the point of view of law, it is always to be remembered that states so intervening are going beyond their legal powers. Their excuse or their justification can only be a moral one[1]. [The latest instance of such an intervention is not calculated to illustrate the disinterestedness of the intervening powers. The original terms of the Treaty of Shimonoseki, concluded in April 1895 between China and Japan, provided for the cession to the latter of the Liao-tong Peninsula including Port Arthur. Thereupon Russia, Germany and France interposed with what was euphemistically termed 'a friendly representation,' and informed Japan, practically under the threat of war, that she would not be allowed to retain any increase of territory on the mainland. Great Britain was invited to join in the remonstrance, but declined to do so; Lord Rosebery however advised Japan to yield to the overwhelming forces arrayed against her, a course which was reluctantly adopted. The reason assigned for the intervention was the danger to the independence of Korea and the humiliation inflicted upon the Court of Pekin if Japan were thus to acquire

[1] M. Rolin Jaequemyns, in treating of the action of the European powers with reference to the Greco-Turkish conflict of 1885-6 (Rev. de Droit Int. xviii. 603), expresses the opinion that the Eastern Question constitutes a case apart, and that within the area of the Turkish Empire and the small states adjoining there exists 'une autorité collective, historiquement et juridiquement établie; c'est celle des grandes puissances.' I cannot see that the case differs from any other in which common action is taken or settlements are effected by the great European powers, except in the circumstance that danger being great and constantly recurrent, preventive interference may need also to be recurrent. Such interference must still be justified on each occasion by the necessities of the moment [and no such ground as that laid down by M. Jaequemyns was adopted by the Powers on the occasion of their intervention on behalf of Greece after the war of 1897].

PART II CHAP. VIII a footing upon the Gulf of Pe-chi-li. Into the motives of France and Germany it is unnecessary to enter; but the facts that in 1898 Russia obtained from China a 'lease' of Port Arthur under which it has been converted into one of the strongest naval ports in the world, and that she remains in virtual occupation of the Liao-tong Peninsula, cast a significant light upon her action.]

CHAPTER IX

THE AGENTS OF A STATE IN ITS INTERNATIONAL RELATIONS

Agents of a state.

The agents of a state in its international relations are—

i. The person or persons to whom the management of foreign affairs is committed.

ii. Agents subordinate to these, who are—

1. Public diplomatic agents,
2. Officers in command of the armed forces of the state,
3. Persons charged with diplomatic functions but without publicly acknowledged character,
4. Commissioners employed for special objects, such as the settlement of frontiers, supervision of the execution of a treaty, &c.

With international agents of the state properly so called may be classed consuls, who are only international state agents in a qualified sense.

Person to whom the management of foreign affairs is committed by the constitution of the state.

The person or persons who constitute the first-mentioned kind of state agent are determined by the public law of the state the agents of which they are. A state may confide the whole management of its international affairs to a single person, or to a group of persons made up in one of many different ways; but, as was before mentioned, foreign states are indifferent to the particular form of the government under which a community may choose to place itself, and can only require that there shall be an ascertained agent or organ of some kind. However the organ may be constituted, it is completely representative of the state; its acts are the acts of the state, and are definitively binding on the latter so long as the authority delegated by it has not been recalled. For international purposes the continuance or the

recall of authority is judged of solely upon the external facts of the case; so long as a person or body of persons are indisputably in possession of the required power, foreign states treat with them as the organ of the state; so soon as they cease to be the actual organ, foreign states cease dealing with them; and it is usual, if the change is unquestionably final, to open relations with their successors independently of whether it has been effected constitutionally. When the finality of the change is doubtful, it is open to a government in the exercise of its discretion, under the same limitations with which it is open in the case of newly-formed states, either to treat the person or body in whom the representation of the country is lodged as being established, or to enter only into such relations of an imperfect kind as may be momentarily necessary[1].

Observances due to a sovereign in a foreign state;

When a state has an individual head, whether he be a sovereign or the chief of a republican government, he is considered so to embody the sovereignty of his state that the respect due to the state by foreign powers in virtue of its sovereignty is reflected upon him, and takes the form of personal observances, some of which are purely honorary, while others rest upon the double foundation of respect and of their necessity to enable the head of the state when abroad to be free to exercise the functions with which he is usually invested. The nature and extent of the latter observances have already been discussed[2]; the former, in so far as their specific forms are concerned, are mere matters of etiquette—it is sufficient to remark with reference to them that their object being to express the respect due to an independent state, an intentional neglect to comply with them must be regarded as an insult to the state, and consequently as being an act which it has a right to resent.

to an elective head of a state.

Although no difference exists between the observances due to hereditary and elective heads of a state in their capacity of heads, a certain difference appears in the conditions under which they

[1] Comp. antea, pt. ii. ch. i.

[2] Antea, p. 169.

are respectively regarded as appearing in that capacity. An hereditary sovereign is always looked upon as personifying his state for ceremonial purposes, except when he suppresses his identity by travelling in foreign countries incognito, or when he puts himself in a position inconsistent with the assertion of sovereignty by taking service under another sovereign; the chief of a republic, on the other hand, only embodies the majesty of his state when he ostensibly acts as its representative.

Diplomatic agents.

The political relations of states are as a rule carried on by diplomatic agents, acting under the superior organs of their states, and either accredited for the conduct of particular negotiations or resident in a foreign state and employed in the general management of affairs.

As those states which live under international law are practically unable to withdraw themselves wholly from intercourse with other states, and as diplomatic agents are the means by which necessary intercourse is kept up, it is not in a general way permissible for a state to refuse to receive a diplomatic agent from another power, when the latter conceives that it is proper to send him, and a state has of course conversely the right to send one when it chooses; in practice, all states, with the exception perhaps of a few very minute ones, have for a long time past accredited permanent representatives to all foreign civilised states of any importance.

Grounds on which a state may refuse to receive them.

Every state can however refuse to receive diplomatic agents for special reasons; as, for example, that their reception may be taken to imply acquiescence in claims inconsistent with rights belonging to the state to which they are sent, or that their personal position is in some way incompatible with the proper performance of their diplomatic functions. Thus England did not receive a legate or nuncio from the Pope when he was a temporal sovereign; other states have on several occasions refused to receive legates when invested with powers incompatible with the state constitution; and the Pope refused in 1875 to accept Prince Hohenlohe as ambassador from Germany because, being a cardinal, he was *ex officio* a member

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of the curia. Countries again have refused to accept ministers whose political opinions have been known to be at variance with the established régime, and states frequently make it a rule not to allow their own subjects to be diplomatically accredited to them[1]. Finally, a state may always decline to receive an agent who is personally disagreeable to the sovereign, or who is individually objectionable on other grounds. If, however, the grounds are trivial, or are not such as to commend themselves to the state accrediting a representative, it is not bound to acquiesce in the rejection; and cases occasionally occur when a diplomatic post remains vacant in consequence, or is only nominally filled, for a considerable time. Thus in 1832, the Emperor Nicholas having refused to receive Sir Stratford Canning, his appointment was not cancelled, and he remained ambassador for three years, though he did not proceed to St. Petersburg; and when in 1885 the American minister then appointed to Vienna resigned, on being objected to by the Austrian government, the legation was left in the hands of a chargé d'affaires[2]. To avoid the in-

[1] It is sometimes discussed, as if the question were open, whether an envoy, accredited to a government of which he is a subject, or a like person attached to a legation remains liable to the laws of his own country. It is of course open to a state to refuse to receive a particular person except upon conditions varying from the ordinary diplomatic usage; but equally of course, unless the condition of subjection to the local laws be stated before recognition of diplomatic character is given, it must be understood that the person is accepted without reserve, and consequently with the advantage of all diplomatic immunities.

In England, it may be noted, the indubitable rule has been affirmed by judicial decision: Macartney v. Garbutt, L. R. xxiv Q. B. D. 368.

[2] This case is a curious one of a double rejection, once upon good, and once upon bad, grounds. The American minister above mentioned was in the first instance appointed to Italy. Objection was taken to him there because he had openly inveighed against the destruction of the temporal power of the Pope. In the actual circumstances of Italy the objection was evidently valid. He was then appointed to Austria; where the government was indisposed to receive a person who had given umbrage to an allied power. There were reasons for which it was inadvisable to put forward the true motive of refusal, and objection was taken because it was believed, apparently under a misapprehension, that he was married, by civil contract only, to a Jewess. It was alleged that he would be in an untenable social position in Vienna. The American government upheld the appointment on the ground

conveniences and the possible dangers, which may spring from inadequate representation, it is the practice of most states to inquire confidentially before making an appointment whether the intended agent will be acceptable to the government to which it is proposed to accredit him. The mere expression of a wish may reasonably be enough to prevent an appointment from being made; good cause alone justifies a demand that it shall be cancelled.

Classification.

By regulations adopted at the Congress of Vienna and Aix-la-Chapelle, and conformed to by all states, diplomatic agents are divided into the following classes, arranged in the order of their precedence.

1. Ambassadors. Legates; who are papal ambassadors extraordinary, charged with special missions, primarily

that by the constitution of the United States it was debarred from inquiring into the religious belief of any official. The pretended reason for non-acquiescence may not have been good; but the American government could perhaps hardly in courtesy urge, as was the fact, that though the objection taken was one which should have been listened to, if it had been made before overt appointment, it was much too trivial to be made a ground of subsequent rejection. The domestic circumstances of the minister might be a source of inconvenience to himself, but, in the particular case of Austria and the United States, they could not seriously interfere with his diplomatic usefulness. Wharton, Digest, i. 601; Geffcken in Holtzendorff's Handbuch, iii. 632. [The most recent example of a person whom a foreign government has refused to receive is also afforded by the United States. In 1891 the Chinese government objected to the appointment of Mr. Blair as minister of the United States to China on the ground that he had 'abused the Chinese labourers too bitterly while in the Senate and was conspicuous in helping to pass the oppressive Exclusion Act.' Mr. Blair maintained that both his language in the Senate and his attitude to the Chinese Exclusion Bill had been misrepresented, but he placed his resignation in the hands of the President. Mr. Wharton, Acting Secretary for Foreign Affairs at Washington, admitted the sovereign rights of any government to determine the acceptability or non-acceptability of a Foreign Envoy while insisting that the President in selecting Mr. Blair's successor could not take into account his previous attitude on the Chinese question. And he declined to admit the sufficiency of the objections urged against Mr. Blair on the ground that they applied to any person who had cast a vote for any measure obnoxious to the Chinese government. The President however preferred to treat the incident as closed by the 'peremptory resignation' of Mr. Blair, and there was no interruption of the diplomatic representation at Pekin. Martens, Nouv. Rec. Gén. 2e Sér. xxii. p. 288.]

representing the Pope as head of the Church, always cardinals, and sent only to states acknowledging the spiritual supremacy of the Pope. Nuncios; who are ordinary ambassadors resident, and are never cardinals.

2. Envoys and ministers plenipotentiary.
3. Ministers resident, accredited to the sovereign.
4. Chargés d'affaires, accredited to the minister of foreign affairs.

The classification is of little but ceremonial value; the right which ambassadors are alleged to possess, of treating with the sovereign personally, having lost its practical importance under modern methods of government.

Credentials.

A diplomatic agent enters upon the exercise of his functions from the moment, and from the moment only, at which the evidence that he has been invested with them is presented by him to the government to which he is sent, or to the agents of other governments whom he is intended to meet, and has been received by it or them. When he is sent to a specific state the evidence with which he is required to be furnished consists in a letter of credence of which the object is to communicate the name of the bearer, to specify his rank as ambassador, minister plenipotentiary, minister resident, or chargé d'affaires, and finally to bespeak credit for what he will communicate in the name of his government. When specific negotiations are to be conducted, he must be furnished with powers to negotiate, which may either be contained in the letter of credence, or, as is more usual, may be conferred by letters patent; their object is to define the limits within which the bearer has the right of negotiating and within which, subject to the qualifications which will be made in discussing treaties, his acts are binding on his government. The full powers indispensable for signing treaties are invariably conferred by letters patent. When a diplomatic agent is charged with a double mission, the one part general and permanent, the other special and temporary, as for example when a minister resident is charged with the conclusion of a commercial treaty,

he is furnished with special letters patent empowering him for the latter purpose, in addition to the general letters patent, or to the powers contained in his letter of credence, given at his entrance on his mission. Ambassadors or ministers not accredited to a specific state, but sent to a congress or conference, are not generally provided with letters of credence, their full powers, copies of which are exchanged, being regarded as sufficient.

Rights of a diplomatic agent.

The entrance of a diplomatic agent upon the exercise of his functions places him in full possession of a right of inviolability, of certain immunities from local jurisdiction, and of rights to ceremonial courtesy, which are conceded to him partly because the intercourse of states could not conveniently be carried on without them, and partly as a matter of respect to the person representing the sovereignty of his state. The right of inviolability primarily secures an envoy from all violence directed against him for political reasons, from being retained as a hostage, or kept as a prisoner of war; but it may also be regarded as the source of that personal immunity from the local jurisdiction which has been already discussed [1], and it so imparts a character of peculiar gravity to offences committed against his person that they are looked upon by the state to which he is accredited as equivalent to crimes committed against itself. The nature and extent of the immunities enjoyed by diplomatic agents have been fully examined; and upon the ceremonial branch of his rights it is unnecessary to enlarge, because although the principle that due ceremonial respect must be given is included in international law, the particular observances, like those to which sovereigns are entitled, fall within the province of etiquette [2].

[1] Antea, p. 172.

[2] Those who take an interest in these 'graves riens,' which however have given rise to infinite disputes, may find them sufficiently or superfluously descanted upon in Moser (Versuch, vols. iii. and iv.), De Martens (Précis, §§ 206–13), Klüber (§§ 217–27), Heffter (§§ 220–1). The Germans have treated the subject with exemplary seriousness, and the learning applicable to it has

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Although diplomatic agents do not enter upon the exercise of their functions, nor consequently into the full enjoyment of their rights, until their reception has taken place, they are inviolable as against the state to which they are accredited while on their voyage to it; and after entering it before their formal reception, or, on being dismissed, until their departure from it, they have a right to all their immunities, their diplomatic character being sufficiently shown by their passports[1].

Termination of a mission.

The mission of a diplomatic agent is terminated by his recall, by his dismissal by the government to which he is accredited, by his departure on his own account upon a cause of complaint stated, by war or by the interruption of amicable relations between the country to which he is accredited and his own, by the expiration of his letter of credence, if it be given for a specific time, by the fulfilment of a specific object for which he may have been accredited, and in the case of monarchical countries by the death of the sovereign who has accredited him. There is some difference of opinion as to whether the death of a sovereign to whom an ambassador or minister is accredited in strictness necessitates a fresh letter of credence, but it is at least the common habit to furnish him with a new one; though the practice is otherwise when the form of government is republican. A like difference of opinion exists as to the consequences of a change of government through revolution, it being laid down on one hand that the relations between the state represented by a minister or other diplomatic agent and the new government may be regarded as informal or official at the choice of the parties, and on the other that a new letter of credence is not only necessary, but that the necessity is one of the distinctive marks separating the position of a diplomatist from that of

been so patiently exhausted in monographs upon special points that a treatise by Moser is devoted to an ambassador's 'Recht mit sechs Pferden zu fahren.'

On the right of inviolability see Phillimore, ii. ch. iv–vi; De Martens, § 215; Bluntschli, §§ 191–3; Heffter, § 212; Calvo, §§ 552–4.

[1] Heffter, § 210; Calvo, § 420.

a consul. Practice appears to be more in favour of the latter view. Letters of credence being personal, it is scarcely necessary to say that a diplomatic mission comes to an end by the death of the person accredited[1].

Dismissal; and recall on demand of the state to which a diplomatic agent is accredited.

It is unnecessary to discuss the reasons for which recall may take place on the proper motion of the accrediting power. If they are personal to the diplomatic agent, they lie between him and his government; if they concern the relations between his country and that to which he is accredited they have to do with matters of offence and quarrel lying outside law. So also when an ambassador or minister is dismissed because of disagreements between the two states, it lies wholly with the state dismissing him to choose whether it will do an act which must bring about an interruption of friendly relations. It is always open to one state to quarrel with another if it likes. But there are occasions on which a diplomatic agent is dismissed, or his recall is demanded, for reasons professing to be personal to himself. In such cases, courtesy to a friendly state exacts that the representative of its sovereignty shall not be lightly or capriciously sent away; if no cause is assigned, or the cause given is inadequate, deficient regard is shown to the personal dignity of his state; if the cause is grossly inadequate or false, there may be ground for believing that a covert insult to it is intended. A country, therefore, need not recall its agent, or acquiesce in his dismissal, unless it is satisfied that the reasons alleged are of sufficient gravity in themselves[2]. In justice to him his

[1] De Martens, Précis, §§ 238–42; Wheaton, Elem. pt. iii. ch. i. §§ 23–4; Heffter, § 223; Phillimore, ii. § ccxl; Bluntschli, §§ 227–43; Calvo, §§ 473–41.

[2] M. Calvo says (§ 439) that a state is bound to recall a minister who has become unacceptable to the government to which he is accredited, on the bare information that he is so, and that it has no right to ask for any reason to be assigned. It would be natural to treat M. Calvo's opinion with respect as that of a professional diplomatist; but what he says is merely a textual translation from Halleck (i. 307), who in turn can only rely upon an opinion of Mr. Cushing, Attorney-General of the United States, which does not support his contention. The language of Merlin, to whom Halleck also refers, is wide of the point. He merely says that 'le souverain étranger ne peut s'offenser si l'on prie son ministre de se retirer quand il a terminé les

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government also may, and usually does, examine whether his conduct in fact affords reasonable foundation for the charges brought against him; in the larger number of instances which have occurred, states have been very slow and cautious in consenting to recall, and no modern case seems to exist in which dismissal has been held to be justified. Various grounds may be imagined which would warrant a state in dismissing or in requiring the recall of a foreign diplomatic agent; but those which have been alleged, and those which for practical purposes are likely to be alleged, resolve themselves into offensive conduct towards the government to which the agent is accredited, and interference in the internal affairs of the state. In 1804 the minister of Spain to the United States was accused of attempting to bribe a newspaper with reference to a matter at issue between the two countries, and of other improper conduct; his recall was demanded; after considerable deliberation the Spanish government acceded to the request, but gave the minister permission to retire at such season of the year as might be convenient to him; he was still at Washington in October of 1807. In 1809 the government of the United States demanded the recall of Mr. Jackson, British minister at Washington, relations with him being suspended until an answer should be returned; Mr. Jackson was stated to have given offensive toasts at public dinners, and to have in effect charged the American administration with 'falsehood and duplicity.' The British government was not satisfied with the evidence of ill conduct produced; but, in order to show its friendliness to the United States, it consented to the recall, placing, however, on record that 'His Majesty has not marked with any expression of displeasure the conduct of Mr. Jackson, who does not appear to have committed any intentional offence against the United States.' Again in 1871 the United States, which has had the misfortune to supply almost all the modern instances in which a government has felt

affaires qui l'avaient amené;' his view being that a state need not receive resident ministers.

itself unable to continue relations with a minister accredited to it, intimated to the Russian government its desire that the head of the Russian legation should be changed. Recall was avoided on the alleged ground of the impossibility of replacing M. Catacazy at the moment; and a compromise seems to have been arrived at; the minister was 'tolerated' for some months on the tacit understanding that he was to be afterwards withdrawn[1]. Two modern cases only of dismissal have occurred. In the spring of 1848 Spain, which was then under the reactionary government of Narvaez, was greatly agitated by revolutionary infection from France. That Queen Isabella occupied the throne was principally due to England; English assistance had been given on the condition of constitutional government; and England was bound to a certain extent by treaty to support the existing régime. In these circumstances Lord Palmerston, the Secretary for Foreign Affairs, thought it opportune to warn the Spanish government through Mr. Bulwer, British minister at Madrid, of what he conceived to be the danger of the course which the government was taking. The warning was violently resented, and the Spanish administration seem to have determined to rid themselves of Mr. Bulwer, whose views they knew to be in full accordance with those of his own government. Shortly afterwards his passports were sent him with an intimation that he must quit Madrid within forty-eight hours. The reason assigned for his dismissal was that he had mixed himself up with the party opposed to the existing order of things, and that he was guilty of complicity in actual revolt. As the Spanish government was unable to offer, and in fact did not seriously attempt to offer, any justification of their charges, Lord Palmerston responded by dismissing the Spanish minister in London[2]. A still more

[1] Papers presented to Parliament in 1813; Wharton, Digest, §§ 84, 106, 107, and Appendix § 106.

[2] State Papers, 1848. M. Calvo (§ 581) states as a fact that Mr. Bulwer was implicated in the insurrectionary movement. To any one acquainted with the traditions of the English public service the charge would in any case

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recent, and very curious, case is that of Lord Sackville's dismissal from Washington[1].

Diplomatic agents in friendly states to which they are not accredited.

The character of a diplomatic agent is not, like that of a sovereign, inseparable from his personality; unlike military and naval commanders, he has usually no functions except in the state to which he is accredited; there is no practical reason for his immunities, and he does not represent his country, except when he is actually engaged in his diplomatic business; he does not therefore as a general rule possess special rights or privileges in states to which he is not accredited as against the government or laws of that state; and there are cases in which a minister has been arrested for personal debts and other civil liabilities, and even in which he has been criminally punished while staying in or passing through the territory of a friendly power. Probably the only respect in which his position differs from that

appear to be scarcely credible; the State Papers above referred to contain ample evidence of its entire groundlessness.

[1] Shortly before the American presidential election of 1888, a person, professing to be an ex-British subject who still 'considered England his mother land,' wrote to Lord Sackville, asking him to advise 'privately and confidentially' how the writer of the letter should vote, and to inform him whether Mr. Cleveland, if re-elected, would adopt a policy of friendliness to England. Lord Sackville answered vaguely and generally that the party in power were fully aware that 'any party openly favouring the mother country would lose popularity;' that he 'believed' the party in question 'to be still desirous of maintaining friendly relations with Great Britain;' but that it was 'plainly impossible to predict the course which Mr. Cleveland may pursue in the matter.' Usually it would be a piece of natural and almost necessary courtesy to assume that a government was disposed to continue friendly relations with a state with which it was on terms of amity; to do so in the United States would no doubt have been indiscreet if the expression of opinion had been public; it may be conceded that it was indiscreet for a diplomatist to express any opinion at all, however privately, during an election; but the act was not treated as an indiscretion; it was treated as an open and intentional offence. The British government was requested to recall Lord Sackville, and as it did not do so by telegraph, without waiting to receive explanations from its minister, his passports were sent to him and he was dismissed within three days. The government of the United States endeavoured to support its action by alleging that Lord Sackville had spoken insultingly of the President and Senate to a newspaper reporter. The allegation was totally destitute of foundation. Parl. Papers, United States, No. 4 (1888) and No. 1 (1889); [De Martens, Nouv. Rec. Gén. 2e Sér. xvi. 649.]

of an ordinary foreign subject is that, while theoretically the latter has no right of access and passage overruling the will of the state, a diplomatic agent must be allowed innocent passage to the state to which he is accredited. Even this meagre privilege is qualified by a right, on the part of the state through which he travels, to prescribe a route and to require that his stay shall not be unnecessarily prolonged. In at least one case indeed a government has gone somewhat further, and has stopped a diplomatic agent on the threshold of its territory, until it could receive his assurance that no longer sojourn would be made than was absolutely necessary. In 1854 Mr. Soulé, a Frenchman by birth, but naturalised in the United States, and accredited to Spain as minister of the latter power, was stopped at Calais by order of the French government, while on his journey to Madrid. In the correspondence which followed, M. Drouyn de Lhuys declared that 'the government of the Emperor has not wished to prevent an envoy of the United States from crossing French territory to go to his post, in order to acquit himself of the commission with which he was charged by his government. But between this simple passage and the sojourn of a foreigner, whose antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference. If Mr. Soulé was going immediately and directly to Madrid, the route of France was open to him; if he intended to come to Paris with a view of staying there, that privilege was not accorded to him. It was therefore necessary to consult him as to his intentions, and he did not afford time for doing this.' Possibly the right of a diplomatic agent to innocent passage may carry with it that the sovereign of the country through which he passes ought, as a matter of courtesy, to make provision for securing him from the operation of its local laws in petty matters, so that he may not be detained on his journey except by grave causes. More than this it would be difficult at present to claim; and it

hardly seems that there is any need to go further in the direction of protecting him from civil or criminal process instituted by private persons [1].

Diplomatic agents at a congress or conference.

The case of negotiators at a congress or conference is exceptional. Though they are not accredited to the government of the state in which it is held, they are entitled to complete diplomatic privileges, they being as a matter of fact representative of their state and engaged in the exercise of diplomatic functions [2].

Diplomatic agents found within enemy jurisdiction.

As a diplomatic agent in the employment of a hostile country is not only himself an enemy, but is likely from the nature of his functions to be peculiarly noxious, it is unquestionable that ministers or other agents accredited by their country to a state friendly to it may be seized and retained as prisoners of war by

[1] De Martens, Précis, §§ 246–7; De Garden, Traité de Diplomatie, ii. 212; Calvo, 596–8; Heffter, § 207. The despatch of M. Drouyn de Lhuys is quoted by Lawrence, note to Wheaton (Elem. pt. iii. ch. i. § 20). Wheaton (loc. cit.) says that the opinion of jurists seems to be somewhat divided on the question of the respect and protection to which a public minister is entitled, in passing through the territories of a state other than that to which he is accredited. He starts with the assertion that an ambassador has a sacred character, and that a government in allowing him to enter its territories makes an implied promise to respect it. He acknowledges that Grotius (De Jure Belli et Pacis, lib. ii. c. 18. § 5), Bynkershoek (De Foro Legatorum, c. ix. § 7), and Wicquefort (1626–82), De l'Ambassadeur, liv. i. § 29 are of a different opinion; Vattel (liv. iv. ch. vii. § 84), whom he quotes in support of his view, merely says that acts of violence must not be done or permitted against an ambassador which would be inconsistent with the protection due to an ordinary stranger, and expressly states that a diplomatic agent has no right to expect the full enjoyment of diplomatic privileges from the hands of a government to which he is not accredited. The only authority, in fact, whom Wheaton can adduce as taking the same view as himself is Merlin (Répertoire, tit. Ministre Public). That an ambassador has a generally sacred character by modern custom, and that he enters a state to which he is not accredited under an implied promise that he will be allowed to enjoy diplomatic privileges, are of course the very points which require to be proved by practice or by a consensus of opinion. Phillimore (§ clxxiv) thinks that an ambassador on his passage through a country, where he is not accredited, would probably be accorded exterritoriality by the courts of all nations, although he could not claim the privilege as a matter of 'tacit compact.' He does not explain upon what ground the courts could take upon themselves to accord exterritoriality in the absence of 'tacit compact,' or in other words of an international usage overriding municipal law.

[2] Phillimore, loc. cit.

an enemy, if they come without permission within the jurisdiction of the latter, whether the state to which they are accredited be hostile or friendly to that which effects the capture. The arrest of the Maréchal de Belleisle in 1744 constitutes a leading case on the subject. He was charged with an embassy from the court of France to that of Prussia, and on his way to Berlin he unwittingly touched the soil of Hanover, which country in conjunction with England was then at war with France. He was seized and sent to England as a prisoner of war. His arrest was not complained of as illegitimate either by himself or his government, and it has since been commonly cited as an example of legitimate practice[1].

Diplomatic agents found by the enemy of the state to which they are accredited in the territory of the latter.

On the other hand, if a diplomatic agent accredited to a country which is at war with another is found by the forces of the latter upon the territory of its enemy, he is conceded all the rights of inviolability which can come into existence as against a state having only military jurisdiction[2]. Whether his privileges extend further, and if so how much further, must probably be regarded as unsettled. The point has not been considered by jurists, and until lately, whether by accident or through the courtesy of belligerents, it has not presented itself in the form of a practical question.

Question as to their correspondence when within a besieged town.

During the siege of Paris however it was partially raised by the conduct of the German authorities with reference to the correspondence of diplomatic representatives shut up in the besieged city. On the minister of the United States being refused leave to send a messenger with

[1] Vattel, liv. iv. ch. vii. § 85; De Martens, Précis, § 247; Heffter, § 207; Moser, Versuch, iv. 120, or De Martens, Causes Cél. ii. 1. Phillimore (ii. § clxxv) while stating the existing rule suggests that 'the true international rule would be that the ambassador should be allowed in all cases the jus transitus innoxii,' meaning apparently that he should only be liable to be seized within an enemy's jurisdiction if he does acts of hostility there; in other words, he would compel a state to allow an ambassador to pass through it in order to negotiate an offensive alliance against it with a state on the further side. Fiore (ed. 1882, § 1221) says that a diplomatic agent of an enemy state 'entrando nel territorio senza salvocondotto potrebbe essere ricondotto alle frontiere.'

[2] De Martens, Précis, § 247; Heffter, § 207.

a bag of despatches to London, except upon condition that the contents of the bag should be unsealed, Mr. Fish directed the American minister at Berlin to protest against the act of the German commanders, and argued in a note, in which the subject was examined, that the right of legation, that is to say the right of a state to send diplomatic agents to any country with which it wishes to keep up amicable relations, is amply recognised by international law, that a right of correspondence between the government and its agent is necessarily attendant upon the right of legation, that such correspondence is necessarily confidential in its nature, that the right of maintaining it would be nullified by a right of inspection on the part of a third power, and finally that there is no trace of any special usage authorising a belligerent to place diplomatic agents in a besieged town on the same footing as ordinary residents by severing their communication with their own governments [1].

The general question.

Looking at the question from the point of view of strict legal right, it is not altogether clear that any good reason can be assigned for giving the interests of a state accrediting an agent priority over those of a belligerent. It is no doubt true that the right of legation is fully established. But the right of legation, primarily at least, is only a right as between the states sending and receiving envoys; in other words, it only secures to each of two states having relations with each other the opportunity of diplomatic intercourse with the other. Is there any sufficient reason for enlarging it to embrace a power of compelling third states to treat countries sending envoys as exercising a right which has priority over their own belligerent rights? Even in time of peace it has been seen that an ambassador can only claim his complete diplomatic immunities in the state to which he is accredited. His privileges in their full extent are dependent on the fact that he has business to transact with the power by whom the privileges are accorded. Wholly apart therefore from

[1] D'Angeberg, Recueil des Traités, &c., concernant la guerre Franco-Allemande, Nos. 756 and 783.

any question as to the effect of a conflict between those privileges and urgent interests of a belligerent, there is no presumption in favour of the existence of an obligation on the part of the latter to grant more than personal inviolability. And if the existence of a conflict can be alleged, the case against the priority of ambassadorial rights over those of a belligerent becomes stronger. The rules of war dealing with matters in which such conflict occurs certainly do not presuppose that the rights of neutrals are to be preferred to those of belligerents; and the government of the United States itself, while in the very act of protesting against the right of communication between a state and its agents being subordinated to belligerent rights, admitted that 'evident military necessity' would justify a belligerent in overriding it. On the whole it seems difficult, in the absence of a special custom, to deny to belligerents the bare right of restricting the privileges of a minister, not accredited to them, within such limits as may be convenient to themselves, provided that his inviolability remains intact.

The question however assumes a different aspect if it is looked at from the point of view of the courtesy which a state may reasonably be expected to show to a friendly power. Diplomatic relations are a part of ordinary international life; there is no reason for supposing that their maintenance is inconsistent with amity towards the invading government; there is on the other hand every reason to suppose that their interruption may be productive of extreme inconvenience to its friend. To withhold any privileges which facilitate those relations, in the absence of suspicion of bad faith or of grave military reasons, is not merely to be commonly discourteous, it is to be ready to injure or imperil the serious interests of a friend without the existence of reasonable probability that any important interests of the belligerent will be remotely touched.

Officers in command of armed forces of the state.

Officers in command of armed forces of the state when upon friendly territory possess certain privileges, which have been already defined, in virtue of their functions and of the repre-

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sentative character of the force which is under them; and in time of war they have certain powers of control within an enemy's country and of making agreements with the enemy in matters incident to war, which will be mentioned in subsequent chapters[1]. To complete the view of their position, and of that of the members of forces under their command, it is only necessary to add that neither they, nor the members of such forces, are in any case amenable to the criminal or civil laws of a foreign state in respect of acts done in their capacity of agents for which they would be punishable or liable to civil process if such acts were done in their private capacity. Thus, when a state in the exercise of its right of self-preservation does acts of violence within the territory of a foreign state while remaining at peace with it, its agents cannot be tried for the murder of persons killed by them, nor are they liable in a civil action in respect of damage to property which they may have caused.

Case of McLeod.

An incident which arose out of the case of the Caroline, mentioned in a previous chapter[2], is of some interest with reference to this point. A person named McLeod, who had been engaged as a member of the colonial forces in repelling the attack made upon Canada from United States territory, and who consequently had acted as an agent of the British government, was arrested while in the State of New York in 1841 upon a charge of having been concerned in what was called the murder of one Durfee, who was killed during the capture of the Caroline. The British minister at Washington at once demanded his release, stating it to be 'well known that the destruction of the steamboat Caroline was a public act of persons in Her Majesty's service, obeying the orders of the superior authorities. That act therefore, according to the usages of nations, can only be the subject of discussion between the two national governments. It cannot be justly made the ground of legal proceedings in the United States against the individuals concerned, who were bound to obey the authorities

[1] Cf. pt. iii. chaps. iv and vii.

[2] Antea, p. 270.

appointed by their own government.' The matter being in the hands of the courts it was impossible for the government of the United States to release McLeod summarily. Its duties were confined to the use of every means to secure his liberation by the courts, and to seeing that no sentence improperly passed upon him was executed. Whether reasonable efforts were made to fulfil the first of these duties it is not worth while to discuss here; and fortunately McLeod, after being detained in prison for several months, was acquitted on his trial. The essential point for the present purpose is that Mr. Webster, Secretary of State in the latter portion of the time during which the affair lasted, acknowledged that 'the government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilised states, to be holden personally responsible in the ordinary tribunals of law for their participation in it;' and that, the year after, an act was passed directing that subjects of foreign powers, if taken into custody for acts done or omitted under the authority of their state, 'the validity or effect whereof depends upon the law of nations,' should be discharged[1].

Diplomatic agents not of publicly acknowledged character.

A diplomatic agent secretly accredited to a foreign government is necessarily debarred by the mere fact of the secrecy with which his mission is enveloped from the full enjoyment of the privileges and immunities of a publicly accredited agent. He has the advantage of those only which are consistent with the maintenance of secrecy; that is to say, he enjoys inviolability and the various immunities attendant on the diplomatic character in so far as the direct action of the government is concerned. Thus his political inviolability is complete; as between him and the government his house has the same immunities as are possessed by the house of a publicly accredited minister; and it may be presumed that no criminal process would be instituted against

[1] Halleck, i. 430, and Ann. Register, 1841, p. 316.

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him where the state charges itself with the duty of commencing criminal proceedings. On the other hand, in all civil and criminal cases in which the initiative can be taken by a private person he remains exposed to the action of the courts; though it would no doubt be the duty of the government to prevent a criminal sentence from being executed upon him by any means which may be at their disposal, consistently with the state constitution[1].

Commissioners.

Commissioners for special objects are not considered so to represent their government, or to be employed in such functions, as to acquire diplomatic immunities. They are however held to have a right to special protection, and courtesy may sometimes demand something more. It would probably not be incorrect to say that no very distinct practice has been formed as to their treatment, contentious cases not having sufficiently arisen[2].

Bearers of Despatches.

Persons carrying official despatches to or from diplomatic agents have the same rights of inviolability and innocent passage that belong to the diplomatic agent himself, provided that their official character be properly authenticated. It is usual to provide this authentication in the form of special passports, stating in precise terms the errand upon which they are engaged.

Consuls.

Consuls are persons appointed by a state to reside in foreign countries, and permitted by the government of the latter to reside, for the purpose partly of watching over the interests of the subjects of the state by which they are appointed, and partly of doing certain acts on its behalf which are important to it or to its subjects, but to which the foreign country is indifferent, it being either unaffected by them, or affected only in a remote and indirect manner. Most of the duties of consuls are of the latter kind. They receive the protests and reports of captains of vessels of their nation with reference to injuries

Their functions.

[1] De Martens, Précis, § 249; Heffter, § 222; De Garden, Traité de Dip. ii.

[2] De Garden, Traité de Dip. ii. 13; Bluntschli, § 243; Heffter (§ 222) considers that commissioners, &c., have a right to the 'prérogatives essentielles dues aux ministres publics.'

sustained at sea; they legalise acts of judicial or other functionaries by their seal for use within their own country; they authenticate births and deaths; they administer the property of subjects of their state dying in the country where they reside; they send home shipwrecked and unemployed sailors and other destitute persons; they arbitrate on differences which are voluntarily brought before them by their fellow countrymen, especially in matters relating to commerce, and to disputes which have taken place on board ship; they exercise disciplinary jurisdiction, though not of course to the exclusion of the local jurisdiction, over the crews of vessels of the state in the employment of which they are; they see that the laws are properly administered with reference to its subjects, and communicate with their government if injustice is done; they collect information for it upon commercial, economical and political matters. In the performance of these and similar duties the action of a consul is evidently not international. He is an officer of his state to whom are entrusted special functions which can be carried out in a foreign country without interfering with its jurisdiction. His international action does not extend beyond the unofficial employment of such influence as he may possess, through the fact of his being an official and through his personal character, to assist compatriots who may be in need of his help with the authorities of the country. If he considers it necessary that formal representations shall be made to its government as to treatment experienced by them or other matters concerning them, the step ought in strictness to be taken through the resident diplomatic agent of his state—he not having himself a recognised right to make such communications[1]. Thus he is not internationally a representative of his state, though he possesses a public official character,

[1] By some Consular Conventions the right is given of making representations to the local authorities not only for the protection of subjects of their state, but in the case of an infraction of any treaty, and of addressing themselves to the government itself, if attention is not paid to their representations, whenever the diplomatic representative of their state is absent.

which the government of the country in which he resides recognises by sanctioning his stay upon its territory for the purpose of performing his duties; so that he has a sort of scintilla of an international character, sufficiently strong to render any outrage upon him in his official capacity a violation of international law, and to give him the honorary right of placing the arms of his country upon his official house[1].

The persons employed as consuls are divided into consuls general, consuls, vice-consuls, and consular agents, a difference of official rank being indicated by the respective names. The division is not one of international importance.

Mode of appointment.

A consul may either be a foreigner to the country within which he exercises his functions, and his office may be the only motive of his sojourn there, or he may be a foreigner who for purposes of commerce or other reasons lives in the state independently of his office, and has perhaps acquired a domicile there, or finally he may be a subject of the state in which he executes the functions of consul. A consul general or consul is in all cases appointed by a commission or patent, which is communicated to the government of the country where he is to reside. On its receipt by the latter government he is recognised by it through the issue of what is called an exequatur or confirmation of his commission, which enables him to execute the duties of his office, and guarantees such rights as he possesses in virtue of it. Vice-consuls and consular agents are usually also appointed by patent, but sometimes are merely nominated by the consul to whom they are subordinate; the recognition of vice-consuls is generally given by means of an exequatur; and it is frequently issued even to consular agents, though it is perhaps more common that recognition is given in a less formal manner. An exequatur usually consists in a letter patent signed by the sovereign, and countersigned by the minister of foreign

[1] Spain, which in several respects gives exceptional privileges to consuls, in this matter is less liberal than other countries. The arms of the consul's state may only be put up inside his house.

affairs; but it is not necessarily conferred in so formal a manner; in Russia and Denmark the consul merely receives notice that he is recognised, and in Austria his commission is endorsed with the word 'exequatur' and impressed with the imperial seal. The exequatur is not issued as of course, and it may be refused if the person nominated as consul is personally objectionable for any serious reason. Thus in 1869 the exequatur was refused by England to a certain Major Haggerty, an Irishman naturalised in the United States, who was known to have been connected with Fenian plots. Again, the exequatur may be revoked if the consul outsteps the limits of his functions, especially if he meddles in political affairs; and though revocation seldom takes place, it being the practice to give an opportunity of recalling the offending consul to the state by which he has been nominated, a certain number of instances have occurred in which the measure has been resorted to. Thus in 1834 the Prussian consul at Bayonne having helped in getting clandestinely into Spain supplies of arms for the Carlists, and his government having refused to recall him, his exequatur was withdrawn; in 1856 the exequatur of three English consuls in the United States was revoked on the ground of their alleged participation in attempts to recruit men for the British army during the Crimean War; the exequatur was withdrawn from an American citizen acting as consul at St. Louis for a foreign power for endeavouring to make use of his consular office to escape from military service during the Civil War; and in 1866 the consul for Oldenburg at New York was deprived of his exequatur for refusing to appear and give evidence before the Supreme Court in a cause to which he was one of the parties[1]. So soon as the exequatur is revoked

Dismissal.

[1] Possibly a state may in strictness have the right to withdraw an exequatur without cause. In 1861 the English and French consuls at Charleston, under identical directions from their respective governments, jointly expressed to the Confederate government a hope that the Confederate States would observe the provisions of the Treaty of Paris with respect to the capture of private property at sea. The exequatur of the English consul was revoked by the Federal government on the ground that, in making the

the person up to that time consul totally loses his official character.

Privileges. The functions of a consul being such as have been described, it being frequently the case that he is a subject of the state in which he exercises them, and the tenure of his office being dependent upon so formal a confirmation and continued permission on the part of that state, it is natural that he should not enjoy the same privileges as agents of a state employed in purely international concerns or representative of its sovereignty. As a general rule he is subjected to the laws of the country in which he lives to the same extent as persons who are of like status with himself in all points except that of holding the consular office. Consuls, the sole object of whose residence is the fulfilment of their consular duties, those who are chosen from among persons domiciled in the country, and those who are subjects of the state, are broadly in the same position respectively as other commorants, domiciled persons, and subjects. It is agreed however that the official position of a consul commands some ill-defined amount of respect and protection; that he cannot be arrested for political reasons; that he has the specific privileges of exemption from any personal tax and from liability to have soldiers quartered in his house, and the right of

communication in question, he had infringed a statute providing that no person not authorised by the President should assist in any political correspondence with the government of a foreign state 'in relation to any disputes with the United States, or to defeat the measures of their government.' The alleged ground was obviously a mere pretence; for (1) the exequatur of the French consul was not withdrawn, (2) the consul was employed in a business with which the United States had no concern, viz. in obtaining protection for British commerce from a de facto authority. The revocation of the exequatur remained therefore without plausible ground assigned or assignable. Nevertheless Lord Russell 'did not dispute the right of the United States to withdraw the exequatur of Mr. Consul Bunch, though H.M.'s government are of opinion that there was no sufficient ground for that act of authority' (Parl. Papers, North Am. 4, 1862); and it is in fact not easy to see how the refusal without reason assigned to allow a person, who is not representative of his state, and who therefore is not identified with its sovereignty, to continue to exercise certain functions in a given territory, can be beyond the strict powers of the sovereign of that territory.

putting up the arms of his nation over his door; and that he must be conceded whatever privileges are necessary to enable him to fulfil the duties of his office, except such as would withdraw him from the civil and criminal jurisdiction of the courts [1],—it being understood to be implied in the consent given by the state to his appointment for the performance of certain duties that all reasonable facilities must be given for their fulfilment. These latter privileges appear to be reducible to inviolability of the archives and other papers in the consulate [2], and to immunity from any personal obligations, weighing under the local law upon private persons, which are incompatible with a reasonably continuous presence of the consul at his consulate or with his ability to go wherever he may be called by his

[1] For obvious reasons a consul is not liable to the courts for acts done by order of the government from which he holds his commission.

[2] In the second edition of this book I stated on the authority of M. Calvo (§ 468) that the archives of the French consulate in London were seized and sold not many years ago for arrears of house tax payable by the landlord of the house occupied by the consulate; and on the authority of Mr. Lawrence (Rev. de Droit Int. x. 317) that in 1857 the whole consular property in the United States consulate at Manchester, with flag, seal, arms, and archives, was seized for a private debt of the consul, and would have been sold if security had not been temporarily given by a private person, and if the American minister in London had not paid the amount due. I supposed that the seizure had been found to be legally permissible, and it appeared to me that a state of the law which permitted consular archives to be sold was certainly not to be commended.

I regret that the fact of two similar but independent stories being told by writers of repute, who had treated in much detail and apparently with care, of the whole subject of the position of consuls, induced me to deviate from a habit, which has been forced upon me by experience, of never repeating any assertion to the disadvantage of England, made by a foreign writer, without myself examining upon what evidence it rests.

In the Journal de Droit International Privé for 1888 (p. 66), M. Clunet stated on the authority of the Foreign Office and the Inland Revenue Department that no such incident had occurred as that alleged by M. Calvo. I find on inquiry that the Manchester case is entirely unknown; and though the circumstances differ from those of the London case in that the debt is said to have been a private one, and that in consequence the seizure need not necessarily have become known to the public departments, the American minister is so unlikely to have neither taken official notice of the matter nor tested the legality of the seizure, that I can have no hesitation in relegating this case also to the domain of fiction.

consular duty[1]. Thus it is held that consuls are exempt from serving on juries, because such employment implies absence, and may compel them to travel to some distance from their official residence; and as a matter of course they cannot be drawn for service in militia or even in a municipal guard. If possible also, a consul accused of a criminal offence ought to be set at liberty on bail, or be kept under surveillance in his own house, instead of being sent to prison, where the exercise of his functions is difficult or impossible. If a state consents to receive one of its own subjects as consul for a foreign country it consents in doing so to extend to him the same privileges as are due to consuls who are subjects of the foreign country or of third powers.

Position in case of change of government in the country of residence.

It follows from the absence of any political tinge in the functions of a consul that political changes in a state do not affect his official position, and that the nomination of a person for the performance of consular duties in a given territory does not imply that the government of that territory, if of contested legitimacy, is recognised by the state employing the consul. If the form of government of a state is changed, or if the place in which a consul resides is annexed to a state other than that from which he has received his exequatur, no new exequatur is required. The cases of consuls in the Confederated States, nominated before the outbreak of the Civil War, who continued to exercise their functions during its progress, and that of the nomination of consuls by England to the various South American Republics eighteen months before the earliest recognition of any of them as a state, are instances of the dissociation of consular relations from any question of political recognition.

Consideration due to consular house during hostilities.

When a place in which a consul is resident in time of war becomes the scene of actual hostilities, it is usual to hoist the flag of the state in the employment of which he is over the

[1] The United States only claim this immunity for such of their consuls as are citizens of the United States and do not hold real estate or engage in business in the country to which they are sent. Regulations for the Consular Service of the United States, quoted in Halleck, i. 316.

consular house; and the combatants become bound by a usage of courtesy, failure to observe which is peculiarly offensive, to avoid injuring it by their fire or otherwise, except in cases of actual military necessity, or when the enemy makes incontestible use of it as a cover for his own operations[1].

Consuls diplomatically accredited.

Consuls are sometimes accredited as chargés d'affaires. When such is the case their consular character is necessarily subordinated to their superior diplomatic character, and they are consequently invested with diplomatic privileges.

Responsibility of a state for acts done by its agents.

A state is responsible for, and is bound by, all acts done by its agents within the limits of their constitutional capacity or of the functions or powers entrusted to them. When the acts done are in excess of the powers of the person doing them the state is not bound or responsible; but if they have been injurious to another state it is of course obliged to undo them and nullify their

[1] On the functions and privileges of consuls, see De Garden, Traité de Dip. i. 315; Phillimore, ii. §§ ccxlvi-lxxi; Heffter, §§ 244-8; Bluntschli, §§ 244-75; Halleck, i. 310-30; Calvo, §§ 442-500, and 515-20; and especially Lawrence, Commentaire i. 1-103.

Works devoted to the subject have been written by Miltitz (Manuel des Consuls), Tuson (The British Consul's Guide), De Clercq et de Vallat (Guide Pratique des Consulats), and Lehr (Manuel théorique et pratique des agents diplomatiques et consulaires).

Of late there has been a growing tendency to define the position of consuls by conventions. [The rapidity with which they have multiplied renders it necessary to abandon their enumeration: they are all to be found in the collections of De Martens. The typical example printed in Appendix v. to the first edition of this book was the Convention between Austria and the United States, De Martens, Nouv. Rec. Gén. 2e Sér. i. 44.] They differ as to details, e. g. as to the way in which the evidence of consuls is to be procured by the courts, or as to the contraventions of the territorial law for which consuls can be arrested; but in the main they are practically identical, and represent, though with some enlargement, the privileges and functions with which consuls are invested by custom; and see antea, p. 203 n.

Consuls in states not within the pale of international law enjoy by treaty exceptional privileges for the protection of their countrymen, without which the position of the latter would be precarious. These privileges properly find no place in works on international law, because they exist only by special agreement with countries which are incompetent to set precedents in international law. Information with respect to consuls in such states may be found in Lawrence, Comment. 104-284, Phillimore, ii. §§ cclxxii-vii, Calvo, §§ 501-14, and the above-mentioned special works.

effects as far as possible, and, where the case is such that punishment is deserved, to punish the offending agent. It is of course open to a state to ratify contracts made in excess of the powers of its agents, and it is also open to it to assume responsibility for other acts done in excess of those powers. In the latter case the responsibility does not commence from the time of the ratification, but dates back to the act itself.

CHAPTER X

TREATIES

PART II CHAP. X Division of the subject.

It follows from the position of a state as a moral being, at liberty to be guided by the dictates of its own will, that it has the power of contracting with another state to do any acts which are not forbidden, or to refrain from any acts which are not enjoined by the law which governs its international relations, and this power being recognised by international law, contracts made in virtue of it, when duly concluded, become legally obligatory[1].

They may be conveniently considered with reference to—

1. The antecedent conditions upon which their validity depends.
2. Their forms.
3. Their interpretation.
4. Their effects.
5. Certain means of assuring their execution.
6. The conditions under which they cease to be obligatory.
7. Their renewal.

[1] Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are of course not subjects of international law. Of this kind are—

1. Concordats, because the Pope signs them not as a secular prince, but as head of the Catholic Church.

2. Treaties of which the object is to seat a dynasty or a prince upon a throne, or to guarantee its possession, in so far as the agreement is directed to the imposition of the dynasty or prince upon the state for reasons other than strictly international interests, or to their protection against internal revolution, because such contracts are in the interest of the individuals in their personal capacity, and not in their capacity as representatives of the will of the state.

3. Agreements with private individuals, e. g. for a loan.

4. Arrangements between different branches of reigning houses, or between the reigning families of different states, with reference to questions of succession and like matters.

Antecedent conditions of the validity of a treaty.

The antecedent conditions of the validity of a treaty may be stated as follows. The parties to it must be capable of contracting; the agents employed must be duly empowered to contract on their behalf; the parties must be so situated that the consent of both may be regarded as freely given; and the objects of the agreement must be in conformity with law.

Capacity to contract.

All states which are subject to international law are capable of contracting, but they are not all capable of contracting for whatever object they may wish. The possession of full independence is accompanied by full contracting power; but the nature of the bond uniting members of a confederation, or joining protected or subordinate states to a superior, implies either that a part of the power of contract normally belonging to a state has been surrendered, or else that it has never been acquired. All contracts therefore are void which are entered into by such states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states [1].

Possession of sufficient authority by the persons contracting on behalf of the state.

The persons to whom the conduct of foreign relations is delegated by the constitution of a state necessarily bind it by all contracts into which they enter on its behalf [2]. There are also persons who in virtue of being entrusted with the exercise of certain special functions have a limited power of binding it by contracts relating to matters within the sphere of their authority. Thus officers in command of naval or military forces may conclude agreements for certain purposes in time of war [3]. If such persons, or negotiators accredited by the sovereign or the body exercising the general treaty-making power in a state, exceed the limits of the powers with which they are invested, the contracts made by them are null; but it is incumbent upon their state, when any

[1] Bluntschli, § 403; Vattel, liv. ii. ch. xii. § 155; Calvo, § 681.

[2] Comp. antea, p. 297.

[3] For the limits of the powers of military and naval commanders, see postea, pt. iii. chap. viii. For certain cases in which local and other subordinate authorities appear to have powers in some countries to make agreements for particular purposes, see Bluntschli, § 442.

act has been done by the other party in compliance with the agreement, or when any distinct advantage has been received from it, either to restore things as far as possible to the condition in which they previously were, or to give compensation, unless the contract made was evidently in excess of the usual powers of a person in the position of the negotiator, in which case the foreign state, having prejudiced itself by its own rashness, may be left to bear the consequences of its indiscretion [1].

Freedom of consent.

The freedom of consent, which in principle is held to be as necessary to the validity of contracts between states as it is to those between individuals, is understood to exist as between the former under conditions which would not be thought compatible with it where individuals are concerned. In international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for. Consent therefore is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts. And as international law cannot measure what is due in a given case, or what is necessary for the protection of a state which declares itself to be in danger, it regards all compacts as valid, notwithstanding the use of force or intimidation, which do not destroy the independence of the state which has been obliged to enter into them. When this point however is passed constraint vitiates the agreement, because it cannot be supposed that a state would voluntarily commit suicide by way of reparation or as a measure of protection to another. The doctrine is of course one which gives a legal sanction to an infinite number of agreements one of the parties to each of which has no real freedom of will; but it is obvious that unless a considerable

[1] Bluntschli, §§ 404-5 and 407; Heffter, § 84.

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degree of intimidation is allowed to be consistent with the validity of contracts, few treaties made at the end of a war or to avert one would be binding, and the conflicts of states would end only with the subjugation of one of the combatants or the utter exhaustion of both.

Effect of personal intimidation.

Violence or intimidation used against the person of a sovereign, of a commander, or of any negotiator invested with power to bind his state, stand upon a different footing. There is no necessary correspondence between the amount of constraint thus put upon the individual, and the degree to which one state lies at the mercy of the other, and, as in the case of Ferdinand VII at Bayonne, concessions may be extorted which are wholly unjustified by the general relations between the two countries. Accordingly all contracts are void which are made under the influence of personal fear.

Of fraud.

Freedom of consent does not exist where the consent is determined by erroneous impressions produced through the fraud of the other party to the contract. When this occurs therefore;—if, for example, in negotiations for a boundary treaty the consent of one of the parties to the adoption of a particular line is determined by the production of a forged map, the agreement is not obligatory upon the deceived party[1].

Conformity with law.

The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. Thus a treaty is not binding which has for its object the subjugation or partition of a country, unless the existence of the

[1] Heffter, § 85; Klüber, § 143; Bluntschli, §§ 408–9. De Martens (Précis, § 50) regards consent as remaining free whenever the contract is not palpably unjust to the party, the freedom of whose consent is in question. The test of justice or injustice is evidently not a practical one. Phillimore (ii. xlix) well remarks that the obligation of international treaties concluded under the influence of intimidation is analogous to that of contracts entered into to avoid or stop litigation, which are binding upon a party consenting only from fear of the expense and uncertain issue of a law-suit.

latter is wholly incompatible with the general security; and an agreement for the assertion of proprietary rights over the open ocean would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law. It may be added that contracts are also not binding which are at variance with such principles, not immediately applicable to the relations of states, as it is incumbent upon them as moral beings to respect. Thus a compact for the establishment of a slave trade would be void, because the personal freedom of human beings has been admitted by modern civilised states as a right which they are bound to respect and which they ought to uphold internationally.

Forms of contract.

Usage has not prescribed any necessary form of international contract. A valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an engagement, and so soon as such acceptance is clearly indicated. Between the binding force of contracts which barely fulfil these requirements, and of those which are couched in solemn form, there is no difference. From the moment that consent on both sides is clearly established, by whatever means it may be shown, a treaty exists of which the obligatory force is complete [1].

Thus sometimes, when conventional signs have a thoroughly understood meaning, a contract for certain limited purposes may even be made by signal. The exhibition of white flags, for example, by both of two hostile armies establishes a truce [2].

Generally of course international contracts are, as a matter of prudence, consigned to writing, and take the form of a specific agreement signed by both parties or by persons duly authorised on their behalf. Agreements so made are sometimes called treaties, and sometimes conventions. Essentially, there is no

[1] De Martens, Précis, § 49; Klüber, § 143; Heffter, § 87; Phillimore, ii. § 1; Bluntschli, § 422.

[2] De Martens, Précis, § 65; Bluntschli, 422.

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difference between the two forms; but in practice the word treaty is commonly used for the larger political or commercial contracts, the term convention being applied to those of minor importance or more specific object, such as agreements regulating consular functions, making postal arrangements, or providing for the suppression of the slave trade[1]. Occasionally consent is shown, and a treaty is consequently concluded, by edicts or orders in some other shape given to the subjects of the contracting powers[2], or by a declaration and answer, or by a declaration signed by the contracting parties or their agents[3]; frequently it is shown by an exchange of diplomatic notes.

Ratification by the supreme power of treaties made by its agents.

Except when an international contract is personally concluded by a sovereign or other person exercising the sole treaty-making power in a state, or when it is made in virtue of the power incidental to an official station, and within the limits of that power, tacit or express ratification by the supreme treaty-making power of the state is necessary to its validity.

Tacit ratification.

Tacit ratification takes place when an agreement, invalid because made in excess of special powers, or incomplete from want of express ratification, is wholly or partly carried out with the knowledge and permission of the state which it purports to bind; or when persons, such as ministers of state, who usually act under the immediate orders or as the mouth-piece in foreign affairs of the person or body possessing the treaty-making power,

[1] During the negotiations for a treaty the discussion of each sitting and the resolutions arrived at are set down in a document called a protocol. When, as in important negotiations frequently occurs, it is wished that the negotiators shall be bound to give effect to the views expressed by them in the course of debate, the protocol is signed by them. The obligation thus contracted however is practically only binding in honour. It is an agreement which is conditioned upon the success of the negotiations as a whole, and which consequently does not subsist if they fall through from any cause.

[2] e. g. Treaty of Commerce of 1785 between Austria and Russia by simultaneous edicts; De Martens, Rec. iv. 72 and 84.

[3] e. g. The Declaration of Paris of 1856 with respect to maritime law, and that of St. Petersburg of 1868 forbidding the use of explosive balls in war.

enter into obligations in notes or in any other way for which express ratification is not required by custom, without their action being repudiated so soon as it becomes known to the authority in fact capable of definitively binding the state[1].

Express ratification.

Express ratification, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by negotiators accredited for the purpose. The older writers upon international law held indeed that treaties, like contracts made between individuals through duly authorised agents, are binding within the limits of the powers openly given by the parties negotiating to their representatives, and that consequently where these powers are full the state is bound by whatever agreement may be made in its behalf[2]. But it was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a state, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognised by Bynkershoek as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign[3]. Later writers may declare that by

[1] Wheaton, Elem. pt. iii. ch. ii. § 4; Halleck, i. 230. The writers who say that ratification cannot be inferred from silence are evidently thinking of conventions concluded in excess of specific powers, and not of agreements which are practically within the powers of the persons making them, but which are not technically binding from the moment of their conclusion, owing to the signataries not being the persons in whom the treaty-making power of the state is theoretically lodged by constitutional law.

[2] This opinion appears still to meet with a certain amount of support; see Phillimore (ii. § lii), who relies on Klüber (§ 142). Heffter thinks that a state is morally bound in such cases (§ 87).

[3] Quæst. Jur. Pub. lib. ii. c. vii.

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the law of nature the acts of an agent bind his state so long as he has not exceeded his public commission, but they are obliged to add that the necessity of ratification is recognised by the positive law of nations [1].

Ratification not to be refused except for solid reasons.

The necessity of ratification by the state may then be taken as practically undisputed, and the reason for the requirement is one which prevents it from being given as a mere formality. Ratification may be withheld; and perhaps in strict law it is always open to a state to refuse it [2]. Morally however, if not legally, it cannot be arbitrarily withheld. The right of refusal is reserved, not simply to give an opportunity of reconsideration, but as a protection to the state against betrayal into unfit agreements. Its exercise therefore must be prompted by solid reasons. It is agreed, for example, that a state is not bound if a plenipotentiary exceeds his instructions; and a right of refusal must also be held to exist if the new treaty conflicts with anterior obligations, if it is found to be incompatible with the constitutional law of one of the contracting states, if a sudden change of circumstances occurs at the moment of signing it, by which its power to accomplish its object is nullified or seriously impaired, or if an error is discovered with respect to facts, a correct knowledge of which would have prevented the acceptance of the treaty in its actual form [3]. M. Guizot went further when defending the French government for refusing, in consequence of the opposition of the Chambers, to ratify a treaty made in 1841 for the suppression of the slave trade. 'Ratification,' he maintained, 'is a real and substantive right; no treaty is complete without being ratified; and if, between the conclusion and the ratification, important facts come into existence—new and evident facts—which change the relations of the two powers and the circumstances amidst which the treaty is concluded,

[1] Vattel, liv. ii. ch. xii. § 156; De Martens, Précis, § 48.

[2] Bluntschli at least adopts this view expressly (§ 420), and most writers treat the limitations upon the right of refusal as questions rather of morals than of law.

[3] Wheaton, Elem. pt. iii. ch. ii. § 5; Calvo, § 697.

a full right of refusal exists.' Wide as is the discretion which the language of M. Guizot gives to a state, it probably corresponds better with the necessities of the case than any doctrine which, in affecting to indicate the occasions, or the sort of occasions, upon which ratification may be refused, tacitly excludes cases which are not analogous to those mentioned. With the complicated relations of modern states the reasons which may justify a refusal to ratify a treaty are too likely to be new for it to be safe to attempt to enumerate them. A state must be left to exercise its discretion, subject to the restraints created by its own sense of honour, and the risk to which it may expose itself by a wanton refusal.

Exceptions.

Exceptions to the rule that ratification ought not to be refused, except for solid reasons coming into existence or discovered after the signature of the treaty, occur when by the constitution of a state it is essential to the validity of a treaty concluded by plenipotentiaries duly instructed by the appropriate persons that it shall be sanctioned by a body, such as the Senate in the United States, which is not necessarily even cognizant of the instructions given to the negotiators, and when, the control of expenditure or the legislative power not being in the hands of the person or persons invested with the treaty-making power, the treaty includes financial clauses or requires legislative changes. In such cases, since the different agents of a state bind it only within the limits of their constitutional competence, and since it is the business of the state with which a contract is made to take reasonable care to inform itself as to the competence of those with whom it negotiates, it is an implied condition of negotiations that an absolute right of rejecting a treaty is reserved to the body the sanction of which is needed or in which financial or legislative power resides, and that the discretion of this body is not confined within the bounds which are morally obligatory under other forms of constitution[1].

Reservation of ratification.

It is now the practice to make an express reservation of the

[1] Wheaton, Elem. pt. iii. ch. ii. § 6; Calvo, §§ 707-8; Bluntschli, § 413.

right of ratification either in the full powers given to the negotiators or in the treaty itself. A reservation of this kind is however of no legal value, because it does not enlarge the rights which a state already possesses in law.

Effect of provision that a treaty shall take effect without ratification.

An exception to the requirement that a treaty shall be ratified by the contracting states is said to occur when, as was the case with the Convention of July 1840 between Austria, Great Britain, Prussia, Russia, and Turkey, for the pacification of the Levant, it is expressly provided that the preliminary engagements shall take effect immediately without waiting for an interchange of ratifications [1]. It is difficult to see in what way a treaty of this kind can constitute an exception. The plenipotentiaries who sign it, unless they act under a previous enabling agreement between their states, have no more power to debar their respective governments from the exercise of their legal rights than they have to bind them finally for any other purpose. The treaty is properly a provisional one, which, if carried into effect, receives a tacit ratification by the execution of its provisions.

Completion of ratification.

Ratification is considered to be complete only when instruments containing the ratifications of the respective parties have been exchanged. So soon as this formality has been accomplished, and not until then, the treaty comes into definite operation. But, in the absence of express agreement, effects which are capable of being retroactive, such as the imposition of national character upon ceded territory, are so to the date of the original signature of the treaty, instead of commencing from the time of the exchange of ratifications; and stipulations, the execution of which during the interval between signature and ratification has been expressly provided for, must be carried out subject to a claim which the party burdened by them may make to be placed in his original position, or to receive compensation, if the treaty be not ratified by the other contracting state; because if the stipulations are not carried out, their neglect will

[1] Wheaton, Elem. pt. iii. ch. ii. § 5; Twiss, i. § 233.

be converted into an infraction of the treaty so soon as its ratification is effected[1].

Ratification is given by written instruments, of identical form, exchanged between the contracting parties, and signed by the persons invested with the supreme treaty-making power, or where that power resides in a body of persons, by the agent appropriate for the purpose. In strictness the provisions of the treaty should be textually recited; but it is sufficient, and is perhaps as usual, to recite only the title, the preamble, the date and the names of the plenipotentiaries, the essential requirement in a ratification being only that it shall evidently refer to the agreement as expressed in the text of the treaty[2].

Treaties to be interpreted,

Jurists are generally agreed in laying down certain rules of construction and interpretation as being applicable when disagreement takes place between the parties to a treaty as to the meaning or intention of its stipulations. Some of these rules are either unsafe in their application or of doubtful applicability; and rules tainted by any shade of doubt, from whatever source it may be derived, are unfit for use in international controversy. Those against which no objection can be urged, and which are probably sufficient for all purposes, may be stated as follows:—

1. According to their plain sense.

1. When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications, that any words which may have a customary meaning in treaties, differing from their common signification,

[1] Bluntschli, § 421; Heffter, § 87. Occasionally exceptions are made by agreement to the practice of making the effect of a treaty date from the time of the signature. The Treaty of Paris in 1856 dated from the moment of ratification.

[2] Some countries, especially the United States, have occasionally presented a ratification clogged with a condition or embodying a modification of the treaty agreed upon. Obviously in such cases it is not a ratification, but a new treaty, that is presented for acceptance. The word ratification is simply a misnomer, under which a refusal of ratification is disguised.

It is equally obvious that a new contract is not constituted by a ratification which contains an interpretation clause, agreed upon between the two parties, for the purpose of removing an obscurity in the original text.

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must be understood to have that meaning, and that a sense cannot be adopted which leads to an absurdity, or to incompatibility of the contract with an accepted fundamental principle of law.

Difference between England and Holland in 1756.

A celebrated case, illustrating the operation of this rule, is that of the difference between England and Holland in 1756 as to the meaning of the treaties of guarantee of 1678, 1709, 1713, and 1717, the last-mentioned of which was renewed by the Quadruple Alliance of 1718 and by the Treaty of Aix la Chapelle in 1748. By these treaties England and Holland guaranteed to each other all their rights and possessions in Europe against 'all kings, princes, republics and states,' and specific assistance was stipulated if either should 'be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of its states, territories, rights, immunities, and freedom of commerce.' On assistance being demanded by England from Holland, the latter power, which was unwilling to give it, argued that the guarantee applied only to cases in which the state in want of help was in the first instance the attacked and not the attacking party in the war, and alleged that England was in fact the aggressor. It was also argued that even if France were the aggressor in Europe, her aggressions there were only incidents of a state of war which had previously arisen in America, to hostilities on which continent the treaties did not apply. In taking up these positions the Dutch government assumed that the guarantee which it had given would be incompatible with international law if it were understood as covering instances of attack upon the territories of the guaranteed powers arising out of an aggression made by the latter; and it consequently held that the language of the treaties into which it had entered must be construed in some other than its plain sense. The assumption made by Holland was at variance with one of the principles upon which international law rests, and necessarily rests. As has been already said, the causes of war are generally too complex, and it is usually too open to argument whether an attack is properly to be considered

aggressive or defensive, for the question whether a war is just or unjust to be subjected to legal decision. Accordingly both parties in all wars occupy an identical position in the eye of the law. The assumption of the Dutch being indefensible, all justification of their conduct fell to the ground; for Mr. Jenkinson in his 'Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations,' had no difficulty in showing that the bare words of the treaties, if uncontrolled by any principle of international law, could only be reasonably understood to refer to attacks made at any time in the course of a war, the expressions used being perfectly general[1].

Clayton-Bulwer Treaty.

A later case, in which it was necessary to reaffirm the rudimentary principle that effect is to be given to the plain meaning of the language of a treaty when a plain meaning exists, is that of the Clayton-Bulwer Treaty of 1850. By that treaty the government of Great Britain and the United States declared 'that neither one nor the other will ever . . . occupy, or fortify, or colonise, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America, nor will either make use of any protection which either affords, or may afford, or any alliance which either has, or may have, to or with any state or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying or colonising Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same.' Under the terms of this engagement the United States called upon England to abandon a protectorate over the Mosquito Indians, which she had exercised previously to the date of the treaty, urging that the Indians being a savage race a 'protectorate must from the nature of things be an absolute submission of these Indians to the British government, as in fact it has ever been.' Lord Clarendon met the demand by referring to the principle that

[1] Jenkinson's Treaties, Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations.

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'the true construction of a treaty must be deduced from the literal meaning of the words employed in its framing,' and pointed out that the 'possibility' of protection is clearly recognised, so that the intention of the parties to the arrangement must be taken to be 'not to prohibit or abolish, but to limit and restrict such protectorate.' The whole of the words in fact limiting the use which could be made of a protectorate must have been excised before the interpretation contended for by the American government could become matter for argument[1].

2. When terms have a different legal meaning in different states, according to their meaning in the state to which they apply.

2. When terms used in a treaty have a different legal sense within the two contracting states, they are to be understood in the sense which is proper to them within the state to which the provision containing them applies; if the provision applies to both states the terms of double meaning are to be understood in the sense proper within them respectively. Thus by the treaty of 1866 it was stipulated between Austria and Italy, that inhabitants of the provinces ceded by the former power should enjoy the right of withdrawing with their property into Austrian territory during a year from the date of the exchange of ratifications. In Austria the word inhabitant signifies such persons only as are domiciled according to Austrian law; in Italy it is applied to every one living in a commune and registered as resident. The language of the treaty therefore had not an identical meaning in the two countries. As the provision referred to territory which was Austrian at the moment of the signature of the treaty, the term inhabitant was construed in conformity with Austrian law[2].

3. When a plain sense is wanting, according to their spirit,

3. When the words of a treaty fail to yield a plain and reasonable sense they should be interpreted in such one of the following ways as may be appropriate:—

a. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, improper, ambiguous, or obscure passages, or by the provisions of the instrument as a whole. This is so far an exclusive, or rather a controlling

[1] De Martens, Rec. Gén. ii. 219–39.

[2] Fiore, § 1121.

method, that if the result afforded by it is incompatible with that obtained by any other means except proof of the intention of the parties, such other means must necessarily be discarded; there being so strong a presumption that the provisions of a treaty are intended to be harmonious, that nothing short of clear proof of intention can justify any interpretation of a single provision which brings it into collision with the undoubted intention of the remainder.

or their reasonable sense.

β. By taking a reasonable instead of the literal sense of words when the two senses do not agree. It was stipulated, for example, by the Treaty of Utrecht that the port and fortifications of Dunkirk should be destroyed, 'nec dicta munimenta, portus, moles, aut aggeres, denuo unquam reficiantur.' It was evident that England required the destruction of Dunkirk not because of any feeling with regard to the particular port and fortification in themselves, but because her interests were affected by the existence of a defensible place of naval armament immediately opposite the Thames; the particular form of words chosen was obviously adopted only because an attempt to avoid the obligations of the treaty by the creation of a new place in a practically identical spot was not anticipated by the English negotiators. When therefore France, while in the act of destroying Dunkirk in obedience to her engagements, began forming a larger port, a league off, at Mardyck, England objected to the construction put upon the language of the treaty as being absurd. The French government in the end recognised that the position which it had taken up was untenable, and the works were discontinued[1].

4. So as to give due effect to the fundamental legal rights of a state.

4. Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language a treaty must be so construed as to give effect to those rights. Thus, for example, no treaty can be taken to restrict by implication the exercise of rights of sovereignty or property or self-preservation. Any restriction of such rights must be effected in a clear and

[1] Phillimore, ii. § lxxiii.

PART II CHAP. X distinct manner. A case illustrative of this rule is afforded by a recent dispute between Great Britain and the United States. By the Treaty of Washington of 1871, it was provided that the inhabitants of the United States should have liberty, in common with the subjects of Great Britain, to take fish upon the Atlantic coasts of British North America. Subsequently to the conclusion of the treaty, the Legislature of Newfoundland passed laws with the object of preserving the fish off the shores of the colony; a close time was instituted, a minimum size of mesh was prescribed for nets, and a certain mode of using the seine was prohibited. These regulations were disregarded by fishermen of the United States; disturbances occurred at Fortune Bay between them and the colonial fishermen; and the matter became a subject of diplomatic correspondence in the course of which the scope of the treaty came under discussion. It was argued by the United States that the fishery rights conceded by the treaty were absolute, and were to be 'exercised wholly free from the restraints and regulations of the Statutes of Newfoundland now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that government;' in other words it was contended that the simple grant to foreign subjects of the right to enjoy certain national property in common with the subjects of the state carries with it by implication an entire surrender, in so far as the property in question is concerned, of one of the highest rights of sovereignty, viz. the right of legislation. That the American government should have put forward the claim is scarcely intelligible. There can be no question that no more could be demanded than that American citizens should not be subjected to laws or regulations, either affecting them alone, or enacted for the purpose of putting them at a disadvantage[1].

5. So as to give what is necessary to the

5. Subject to the foregoing rule every right or obligation which is necessarily attendant upon something clearly ascertained

[1] De Martens, Nouv. Rec. Gén. xx. 708; Parl. Papers, U.S. No. 3, 1878. Cf. antea, p. 278.

to be agreed to in the treaty, including a right to whatever may be necessary to the enjoyment of things granted by it, is understood to be tacitly given or imposed by the gift or imposition of that upon which it is attendant[1].

enjoyment of things granted by them.

Interpretation of conflicting agreements.

When a conflict occurs between different provisions of a treaty or between different treaties, the provision or treaty to which preference is to be given is determined by the following rules:—

1. A generally or specifically imperative provision takes precedence of a general permission. Thus if a treaty concedes a right of fishing over certain territorial waters and at the same time prohibits the persons to whom permission is given from landing to dry or cure the fish which may be caught, the prohibition outweighs the permission, notwithstanding that the power of curing and drying on the spot may be found to be so essential to the enjoyment of the fishing that the right to fish is nullified by its absence.

2. On the other hand, a special permission takes precedence of a general imperative provision; that is to say, if a treaty contains an agreement couched in general terms, and also an agreement with regard to a particular matter which if allowed to operate will act as an exception from the former agreement, effect is given to the exception.

3. If a penalty for non-observance is attached to one of two prohibitory stipulations and not to the other, or if a more severe penalty is attached to one than the other, preference is given to that which is the better guarded. If a penalty is attached to neither, the stipulation has precedence which has the more precision in its command.

[1] On the whole subject of the interpretation of treaties see Grotius, De Jure Belli et Pacis, lib. ii. cap. xvi; Vattel, liv. ii. ch. xvii; Heffter, § 95; Phillimore, ii. ch. viii; Calvo, §§ 713–22; Fiore, §§ 1117–31.

Besides the above rules of interpretation many others are usually given, which scarcely seem to be of much practical use in international law. They are mainly rules of interpretation of Roman law, which appear to have been imported into international law without a very clear conception of the manner in which they can be supposed to be applicable. There is no place for the refinements of the courts in the rough jurisprudence of nations.

4. When stipulations are of identical nature, that is to say when both are general and prohibitory or special and imperative, &c., and no priority can be ascribed to either upon the grounds mentioned in the last rule, that which is the more important must be observed by the party obliged, unless the promisee, who is at liberty to choose that the less important stipulation shall be performed, exercises his power of choice in that direction.

5. When two treaties made between the same states at different dates conflict, the latter governs, it being supposed to be in substitution for the earlier contract. It is hardly an exception from this rule that when of two conflicting treaties the later is made by an inferior though competent authority, the earlier is preferred. In the year 1800, for example, Piacenza was surrendered with its garrison to the French by the Austrian commandant, who from the nature of his command had authority to conclude an agreement of the kind made. The surrender took place at three in the afternoon, and at eight in the morning of the same day a convention had been concluded between generals Berthier and Melas, under which the whole Austrian forces were to retire behind the Mincio, giving over Piacenza to the French, but withdrawing the garrison. It was claimed and at once admitted that the latter convention ought to be carried out to the exclusion of the former[1].

6. When two treaties conflict which are made with different states at different times, the earlier governs, it being of course impossible to derogate from an engagement made with a particular person by a subsequent agreement with another person entered into without his consent. Hence until all the parties to a treaty have consented to forego their rights under it, no subsequent treaty incompatible with it can be valid; any such treaty is null at least to the extent of its direct incompatibility; and if the incompatible portions are not

[1] Corresp. de Nap. i. vi. 365.

separable from the remainder, it is null in its entirety[1]. Thus when Russia, in 1878, concluded with Turkey the Treaty of San Stefano, 'every material stipulation of which involved a departure from the treaty of 1856,' that is to say, from a treaty to which not only Russia and Turkey, but England, France, Austria, Prussia and Sardinia were parties, the later treaty was void as against the last-mentioned powers, or the states legally representing them[2].

Treaties of guarantee.

A kind of treaty which demands a few words of separate notice on account of its special characteristics is a treaty of guarantee. Treaties of guarantee are agreements through which powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction by the use of such means as may be specified or required against a country acting adversely to such stipulations.

Guarantees may either be mutual, and consist in the assurance to one party of something for its benefit in consideration of the assurance by it to the other of something else to the advantage of the latter, as in the Treaty of Tilsit, by which France and Russia guaranteed to each other the integrity of their respective possessions; or they may be undertaken by one or more powers for the benefit of a third as in the treaty of the 15th April, 1856, by which England, Austria, and France guaranteed

[1] Grotius, lib. ii. cap. xvi. § 29; Vattel, liv. ii. ch. xvii. §§ 312–22; Phillimore, ii. ch. ix; Calvo, §§ 720–3.

M. Bluntschli (§ 414) says that 'les traités de ce genre ne sont pas nuls d'une manière absolue, mais seulement d'une manière relative. Ils conservent toute leur efficacité lorsque l'état dont les droits antérieurs sont lésés ne s'oppose pas aux modifications amenées par le traité.' It is difficult to understand this doctrine. Two incompatibles cannot co-exist. One or other of the treaties, in so far as they are incompatible with one another, must be destitute of binding force. Either the second treaty has abrogated the first or the first alone is operative. It is granted that the second treaty has not abrogated the first; it therefore has no efficacity to keep. It can only acquire validity when all the parties with whom a contract was made in the first treaty give their consent to the abrogation of the latter, and it must date as a contract from that moment.

[2] De Martens, Nouv. Rec. Gén. 2e Sér. iii. 246, 259.

'jointly and severally the independence and the integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th March;' or finally they may be a form of assuring the observance of an arrangement entered into for the general benefit of the contracting parties, as in the treaties of 1831 and 1839, by which Belgium was constituted an independent and neutral state in the common interests of the contracting powers, and while placed under an obligation to maintain neutrality received a guarantee that it should be enabled to do so; or in the treaty of November, 1855, by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory belonging to the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever, in consideration of a guarantee by England and France of the Swedish and Norwegian territory[1]. In the two former cases a guarantor can only intervene on the demand of the party or, where more than one is concerned, of one of the parties interested, because the state in favour of which the guarantee has been given is the best judge of its own interests, and as the guarantee purports to have been given solely or at least primarily for its benefit, no advantage which may happen to accrue to the guaranteeing state from the arrangements to the preservation of which the guarantee is directed can invest the latter power with a right to enforce them independently. In the last-mentioned case, on the other hand, any guarantor is at liberty to take the initiative, every guaranteeing state being at the same time a party primarily benefited.

[The treaty of 1902 between Great Britain and Japan, though clearly a Treaty of Guarantee, is too complex in its stipulations to fall strictly within any of the above categories. Under it the contracting parties, while mutually recognising the independence of China and Corea, declared that in view of their special

[1] De Martens, Rec. viii. 642; Hertslet, Map of Europe by Treaty, 863, 870, 981, 983, 1241, 1281.

interests in these countries, it should be admissible for either of them to take such measures as might be indispensable to safeguard those interests from the aggressive action of any other powers or from internal disturbances necessitating intervention for the protection of life and property. It was further agreed that if either Great Britain or Japan should become involved in war with another power in defence of their respective interests as above described, the other contracting party should maintain strict neutrality and use its best efforts to prevent other powers from joining in hostilities against its ally. Should, however, any other power or powers take part in the conflict, then it was agreed that the other contracting party should come to the assistance of its ally, conduct the war in common, and make peace in mutual agreement with it [1].]

When a guarantee is given by a single state or by two or more states severally, or jointly and severally, it must be acted upon at the demand of the country benefited unless such action would constitute a clear infraction of the universally recognised principles and rules of international law, unless it would be inconsistent with an engagement previously entered into with another power, or unless the circumstances giving rise to the call upon the guaranteeing power are of the nature of internal political changes;—a guarantee given to a particular dynasty, for example, is good only against external foes and not against the effects of revolution at home, unless the latter object be specifically mentioned, and then only subject to the limitations before mentioned. It need scarcely be added that the fulfilment of the guarantee must be possible [2].

Effect of a collective guarantee.

When a guarantee is given collectively by several powers the extent of their obligation is not quite so certain. M. Bluntschli

[1] [Annual Register 1902, pp. 58, 59.]

[2] Vattel, liv. ii. ch. xvi. §§ 235-9; Klüber, §§ 157-9; Twiss, i. § 231; Phillimore, ii. ch. vii; Bluntschli, §§ 430-41. Sir R. Phillimore thinks that a guarantee 'contra quoscunque' obliges to assistance against rebellion. M. Bluntschli considers that a guarantee falls to the ground when it is irreconcileable with 'les progrès du droit international.'

lays down that they are bound, upon being called upon to act in the manner contemplated by the guarantee, to examine the affair in common for the purpose of seeing whether a case for intervention has arisen, and to agree if possible upon a common conclusion and a common action; but that if no agreement can be arrived at, each guarantor is not only authorised but bound to act separately according to his view of the requirements of the case. A very different doctrine was put forward by Lord Derby in 1867 when explaining in the House of Commons the opinion held by the English government as to the nature of the obligations undertaken by it in signing the Luxemburg convention of that year. According to him a collective guarantee means, 'that in the event of a violation of neutrality all the powers who have signed the treaty may be called upon for their collective action. No one of those powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability. We are bound in honour—you cannot place a legal construction upon it—to see in concert with others that these arrangements are maintained. But if the other powers join with us it is certain that there will be no violation of neutrality. If they, situated exactly as we are, decline to join, we are not bound single-handed to make up the deficiency. Such a guarantee has obviously rather the character of a moral sanction to the arrangements which it defends than that of a contingent liability to make war. It would no doubt give a right to make war, but would not necessarily impose the obligation[1].' It is in favour of the latter construction that a collective guarantee must be supposed to be something different from a several, or a joint and several, guarantee, and that if it imposes a duty of separate intervention in the last resort it is not very evident what distinction can be drawn between them. On the other hand, a guarantee is meaningless if it does no more than provide for common action under circumstances in which the guaranteeing powers would act together apart from treaty, or for a right of

[1] Bluntschli, § 440; Hansard, 3rd Ser. clxxxvii. 1922.

single action under circumstances which would provoke such action as a matter of policy. The only objects of a guarantee are to secure that action shall be taken under circumstances in which a state might not move for its own sake, and to prevent other states from disregarding the arrangement, or attacking the territory guaranteed, by holding up to them the certainty that the force of the guaranteeing powers will be employed to check them. On the construction given to a collective guarantee by Lord Derby neither end would be attained. Whichever view be adopted the word collective is inconvenient. If it imposes a duty, the extent of the duty is not at least clearly defined. If it can be held to prevent a duty from being imposed, it would be well to abstain from couching agreements in terms which may seriously mislead some of the parties to them, or to avoid making agreements at all which some of the contracting parties may intend from the beginning to be illusory.

Effects of treaties 1. upon the contracting parties;

The effect of an international contract is primarily to bind the parties to it by its provisions, either for such time as is fixed, if it be made for a definite period, or until its objects are satisfied, or indefinitely if its object be the infinite repetition of certain acts, or the setting up once for all of a permanent state of things. In all cases the continuance of the obligation is dependent upon conditions which will be mentioned later.

2. upon third parties.

In a secondary manner the due conclusion of an international contract also affects third parties. A state of things has come into existence which, having been legally created in pursuance of the fundamental rights of states, other countries are bound to respect, unless its legal character is destroyed by the nature of its objects, or unless it is evidently directed, whether otherwise legally or not, against the safety of a third state, and except in so far as it is inconsistent with the rights of states at war with one another. So long therefore as a contract is in accordance with law, or consistent with the safety of states not parties to it, the latter must not prevent or hinder the contracting parties from carrying it out.

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Modes of assuring execution of treaties.

It was formerly the habit to endeavour to increase the security for the observance of treaties, offered by the pledged word of the signataries, by various means, which have now almost wholly fallen into disuse. Three only have at all been employed in relatively modern times, viz. the taking of hostages, the occupation of territory, and guarantee by a third power.

The Treaty of Aix la Chapelle in 1748 was the last occasion upon which hostages were given to secure the performance of any agreement other than a military convention. Anything which requires to be said about hostages may therefore be postponed until conventions of the latter kind come under notice.

A guarantee by a third power is only one form of the treaties of guarantee, which have already been noticed.

Occupation of territory was formerly often used as a mode of taking security for the payment of debts for which the territory occupied was hypothecated. In such cases the territory occupied becomes the property of the creditor if a term fixed for repayment of the debt passes without the claim being satisfied, or if possession, as in the case of Orkney and Shetland, which were mortgaged by Denmark to Scotland in 1469, has been retained long enough for a title by prescription to be set up. In recent times occupation of territory by way of security for the payment of a debt has taken place only when the victor in a war has retained possession of part of his enemy's country until payment of the sum levied for war expenses, and occupation to compel the fulfilment of stipulations of other kinds has also occurred only as part of the arrangements consequent upon the conclusion of peace[1].

Extinction of treaties.

International contracts are extinguished when their objects are satisfied or when a state of things arises through which they become void, and they temporarily or definitively cease to

[1] Klüber, §§ 155-6; Phillimore, ii. §§ liv-v; Bluntschli, § 428; Calvo, § 702.

be obligatory when a state of things arises through which they are suspended or become voidable [1].

1. When their objects are satisfied.

The object of a treaty is satisfied if, as sometimes happens with treaties of commerce, it has been concluded for a fixed time, so soon as the period which has been fixed has elapsed, or if it has been concluded irrespectively of time, so soon as the acts stipulated in it have been performed. A treaty, for example, by which one state engages to pay another a sum of money, as compensation for losses endured by the subjects of the latter through illegal conduct of the former, is satisfied on payment being made; and an alliance between two states for the purpose of imposing specified terms upon a third is satisfied when a treaty has been concluded by which those terms are imposed.

It may at first seem to be an exception to this rule, though it is not so in reality, that a treaty is not extinguished when the acts contemplated by it, though done once for all, leave legal obligations behind them. If a treaty stipulates for the cession of territory or the recognition of a new state, the act of cession or of recognition is no doubt complete in itself; but the true object of the treaty is to set up a permanent state of things, and not barely to secure the performance of the act which forms the starting-point of that state; the ceding or recognising country therefore remains under an obligation until the treaty has become void or voidable in one of such of the ways to be indicated presently as may be applicable to it [2].

2. When they become void.

A treaty becomes void—

1. By the mutual consent of the parties, shown either tacitly by the conclusion of a new treaty between them which is inconsistent with that already existing, or expressly by declaration of its nullity [3].

[1] For the effect of war in extinguishing and suspending treaties, see postea, pt. iii. ch. i.

[2] Calvo, § 643. Most writers content themselves with saying that treaties of the above kind are perpetual, without mentioning any reason for their being so.

[3] The former mode of showing mutual consent is of course frequent; of

2. By express renunciation by one of the parties of advantages taken under it.

3. By denunciation; when the right of denunciation has been expressly reserved; or when the treaty, as in the case of treaties of alliance or commerce, postal conventions and the like, is voidable at the will of one of the parties, the nature of its contents being such that it is evidently not intended to set up a permanent state of things.

4. By execution having become impossible, as, for example, if a state is bound by an offensive and defensive alliance with both of two states which engage in hostilities with one another.

5. When an express condition upon which the continuance of the obligation of the treaty is made to depend ceases to exist.

6. By incompatibility with the general obligations of states, when a change has taken place in undisputed law or in views universally held with respect to morals. If, for example, it were found that, by successive renewals of treaties and incorporations of treaties in others subsequently made, an agreement to allow a state certain privileges in importing slaves into the territory of the other contracting power was still subsisting, it might fairly be treated as void, and as not protecting subjects of the former state who might endeavour to introduce slaves in accordance with its terms[1].

3. When they become voidable.

Up to this point it has not been difficult to state the conditions under which treaties cease to be binding. They resume themselves into impossibility of execution, consent of the parties, either present or anticipatory in view of foreseen contingencies, satisfaction of the object of the compact, and incompatibility with undisputed law and morals. With regard to such causes of nullity there can be no room for disagreement, and little for the exercise of caution. It is less easy to lay down precisely the conditions under which

the latter the Treaty of Paris of 1814 is an example, the treaties of Presburg and Vienna between France and Austria, and those of Basle and Tilsit between France and Prussia, having been declared by it to be null. Hertslet, Map of Europe by Treaty, 22 and 25.

[1] Klüber, § 164; Bluntschli, §§ 450 and 454; Calvo, § 726.

a treaty becomes voidable; that is to say, under which one of the contracting parties acquires the right of declaring itself freed from the obligation under which it has placed itself. A clear principle is ready to hand, which, if honestly applied, would generally furnish a sufficient test of the existence or non-existence of the right in a particular case; but modern writers, it would seem, are more struck by the impossibility of looking at international contracts as perpetually binding, than by the necessity of insisting upon that good faith between states without which the world has only before it the alternatives of armed suspense or open war, and they too often lay down canons of such perilous looseness, that if their doctrine is to be accepted an unscrupulous state need never be in want of a plausible excuse for repudiating an inconvenient obligation. And this unfortunately occurs at a time when the growing laxity which is apparent in the conduct of many governments and the curious tolerance with which gross violations of faith are regarded by public opinion render it more necessary than ever that jurists should use with greater than ordinary care such small influence as they have to check wrong and to point out what is right[1].

Test of voidability.

The principle which has been mentioned as being a sufficient test of the existence of obligatory force or of the voidability of a treaty at a given moment may be stated as follows. Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment

[1] Fénelon, in the following passage, perhaps claims too much favour for a short prescription, and he writes with reference to the customs of his age; but essentially he is right for all time. 'Pour donner quelque consistance au moral et quelque sûreté aux nations il faut supposer, par préférence à tout le reste, deux points qui sont comme les deux pôles de la terre entière: l'un que tout traité de paix juré entre deux princes est inviolable à leur égard, et doit toujours être pris simplement dans son sens le plus naturel, et interprété par l'exécution immédiate; l'autre, que toute possession paisible et non-interrompue depuis le temps que la jurisprudence demande pour les prescriptions les moins favorables doit acquérir une propriété certaine et légitime à celui qui a cette possession, quelque vice qu'elle ait pu avoir dans son origine. Sans ces deux règles fondamentales point de repos ni de sûreté dans le genre humain.' Directions pour la Conscience d'un Roi. Œuvres, vi. 319 (ed. 1810).

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when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered. If this be true, and it will scarcely be contradicted, it is only necessary to determine under what implied conditions an international agreement is made. When these are found the reasons for which a treaty may be denounced or disregarded will also be found.

Implied conditions under which a treaty is made.

1. That it shall be observed in its essentials by both parties to it.

It is obviously an implied condition of the obligatory force of every international contract that it shall be observed by both of the parties to it. In organised communities it is settled by municipal law whether a contract which has been broken shall be enforced or annulled; but internationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual state must be allowed in all cases to enforce or annul for itself as it may choose. The general rule then is clear that a treaty which has been broken by one of the parties to it is not binding upon the other, through the fact itself of the breach, and without reference to any kind of tribunal. The question however remains whether a treaty is rendered voidable by the occurrence of any breach, or whether its voidability depends upon the breach being of a certain kind or magnitude. Frequently the instrument embodying an international compact includes provisions of very different degrees of importance, and directed to different ends. Is it to be supposed that an infraction of any one of these provisions, whether it be important or unimportant, whether it has reference to a main object of the treaty or is wholly collateral, gives to a state the right of freeing itself from the obligation of the entire agreement? Some authorities hold that the stipulations of a treaty are inseparable, and consequently that they stand and fall together[1]; others distinguish between principal and secondary articles, regarding infractions of the principal articles only as destructive of the

[1] Grotius, lib. ii. cap. xv. § 15; Vattel, liv. ii. ch. xiii. § 202; Heffter, § 98.

binding force of a treaty[1]. Both views are open to objection. It may be urged against the former that there are many treaties of which slight infractions may take place without any essential part being touched, that some of their stipulations, which were originally important, may cease to be so owing to an alteration in circumstances, and that to allow states to repudiate the entirety of a contract upon the ground of such infringements is to give an advantage to those which may be inclined to play fast and loose with their serious engagements. On the other hand, it is true that every promise made by one party in a treaty may go to make up the consideration in return for which essential parts of the agreement are conceded or undertaken, and that it is not for one contracting party to determine what is or is not essential in the eyes of the other. It is impossible to escape altogether from these difficulties. It is useless to endeavour to tie the hands of dishonest states beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement, though if he had suffered any appreciable harm through the breach he would have a right to exact reparation and an end might be put to the treaty as respects the subject-matter of the broken stipulation. It would of course be otherwise if it could be shown

Calvo (§ 729) adheres to the doctrine, but qualifies it afterwards in such a manner as to make it doubtful how far he intends it to operate.

[1] Wolff, Jus Gentium, § 432; De Martens, Précis, § 59.

that a particular stipulation, though not apparently connected with the main object of the treaty, formed a material part of the consideration paid by one of the parties.

Treaty of Paris, 1856.

In 1856 the Crimean War was ended by the Treaty of Paris. The object of the treaty was to settle the affairs of the East, so far as possible, in a permanent manner; and in order that this should be done it was considered necessary to secure Turkey against being attacked by Russia under conditions decidedly advantageous to the latter power. To this end the prevention of the naval preponderance of Russia in the Black Sea was essential, and the simplest mode of prevention was to forbid the maintenance of a fleet. This course was accordingly fixed upon. But as, without a fleet, Russia would be exposed to danger in the event of war with a third power, unless access to the Black Sea were denied to its enemy, and as at the same time, in the absence of a Russian navy, the presence of foreign fleets was unnecessary to Turkey, the Treaty of Paris, while limiting the number of vessels to be kept within the Sea by the two powers respectively, contained also a promise on the part of Turkey to close the Bosphorus to foreign vessels of war, except in case of hostilities in which she was herself engaged; and the Black Sea was declared to be neutral. In 1870 the Russian government seized the occasion presented by the Franco-German War to escape from the obligations under which it lay, and issued a circular declaring itself to be no longer bound by that part of the Treaty of Paris which had reference to the Black Sea. The grounds upon which it was attempted to justify this proceeding were the following. It was alleged that fifteen years' experience had shown the principle of the neutralisation of the Black Sea to be no more than a theory, because while Russia was disarmed, Turkey retained the privilege of maintaining unlimited naval forces in the Archipelago and the Straits, and France and England preserved their power of concentrating their squadrons in the Mediterranean; it was asserted that 'the treaty of the $\frac{18}{30}$ March, 1856, had not escaped the modifications to which

most European transactions have been exposed, and in the face of which it would be difficult to maintain that the written law, founded upon the respect for treaties as the basis of public right and regulating the relations between states, retains the moral validity which it may have possessed at other times,' the modifications indicated being the changes which had been sanctioned in Moldavia and Wallachia, and which had been effected by 'a series of revolutions equally at variance with the spirit and letter' of the treaty; finally, it was pretended that 'under various pretexts, foreign men of war had been repeatedly suffered to enter the straits, and whole squadrons, whose presence was an infraction of the character of absolute neutrality attributed to those waters, admitted to the Black Sea.' It needed some boldness to put forward the two former excuses. The disadvantages under which Russia lay through the ability of Turkey to maintain a fleet elsewhere than in the Black Sea, and through the power of England and France to place squadrons in the Mediterranean, were neither new nor revealed by the experience of fifteen years; the second of them was of course independent of the treaty, and the first lay before the eyes of the Russian negotiators when they consented to its stipulations. As regards the Danubian Principalities, their relations with the suzerain power had been put aside by the Treaty of Paris for precise definition in a separate convention; the language of the treaty did not exclude their union; they coalesced before a convention was signed; and Russia was a party to that by which their unification was recognised. The third ground is the only one which could be used with some plausibility. 'Whole squadrons' had not been admitted into the Black Sea, but in the course of fifteen years three American vessels, one Russian, one English, one French, and three of other nations, had apparently been allowed to enter, for reasons other than certain ones expressly recognised by the treaty as sufficient. There can be no question that in strictness a breach of the treaty had been committed; but there can be equally little doubt that the admission of a few

isolated ships at different times was not an act in itself calculated to endanger the objects of the treaty, viz. the settlement of Eastern affairs and the security of Turkey, or to impair the efficacy of the safeguards given to Russia by way of compensation for the loss of naval power. Lord Granville indeed in answering the Russian circular did not think it worth while to answer the pleas which it contained. He took for granted that no breach had taken place of such kind as to free Russia from her obligations, and confined himself to 'the question in whose hand lay the power of releasing one or more of the parties to the treaty from all or any of its stipulations. It has always been held,' he says, 'that the right' of releasing a party to a treaty 'belongs only to the governments who have been parties to the original instrument. The despatches of the Russian government appear to assume that any one of the powers who have signed the engagement may allege that occurrences have taken place which in its opinion are at variance with the provisions of the treaty, and though their view is not shared nor admitted by the co-signatary powers, may found upon that allegation, not a request to those governments for a consideration of the case, but an announcement to them that it has emancipated itself, or holds itself emancipated, from any stipulations of the treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such doctrine and of any proceeding which, with or without avowal, is founded upon it, is to bring the entire authority and efficacy of treaties under the discretionary control of each of the powers who may have signed them; the result of which would be the entire destruction of treaties in their essence.' The protest of Lord Granville, although uttered under circumstances which made its practical importance at the moment very slight, nevertheless compelled Russia to abandon the position which it had taken up. A conference was held of such of the powers, signatary of the Treaty of Paris, as could attend, at which it was declared that 'it is an essential principle of the law of nations that no power can liberate itself from the engagements

of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement.' The general correctness of the principle is indisputable, and in a declaration of the kind made it would have been impossible to enounce it with those qualifications which have been seen to be necessary in practice. The force of its assertion may have been impaired by the fact that Russia, as the reward of submission to law, was given what she had affected to take. But the concessions made were dictated by political considerations, with which international law has nothing to do. It is enough from the legal point of view that the declaration purported to affirm a principle as existing, and that it was ultimately signed by all the leading powers of Europe [1].

2. That it shall remain consistent with the rights of self-preservation.

A second implied condition of the continuance of the obligatory force of a treaty is that if originally consistent with the primary right of self-preservation, it shall remain so. A state may no doubt contract itself out of its common law rights—it may, for example, surrender a portion of its independence or may even merge itself in another state; but a contract of this kind must be distinct and express. A treaty therefore becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state, provided that its injurious effects were not intended by the two contracting parties at the time of its conclusion. Thus if the execution of a treaty of alliance or guarantee were demanded at a time when the ally or guaranteeing state were engaged in a struggle for its own existence or under circumstances which rendered war inevitable with another state against which success would be impossible, the country upon which the demand was made would be at liberty to decline to fulfil its obligations of alliance or guarantee. If, again, a treaty is made in view of the continuance of a particular form of government in one or both of the contracting states, either of them may release itself from the agreement so soon

[1] Hertslet's Map of Europe by Treaty, 1256–7, 1892–8, 1904.

as its provisions become inconsistent with constitutional change[1].

3. That the parties to it shall retain their freedom of will with respect to its subject-matter.

It is also an implied condition of the continuing obligation of a treaty that the parties to it shall keep their freedom of will with respect to its subject-matter except in so far as the treaty is itself a restraint upon liberty, and the condition is one which holds good even when such freedom of will is voluntarily given up. If a state becomes subordinated to another state, or enters a confederation of which the constitution is inconsistent with liberty of action as to matters touched by the treaty, it is not bound to endeavour to carry out a previous agreement in defiance of the duties consequent upon its newly-formed relations. In such cases the earlier treaty does not possess priority over the later one, because it cannot be supposed that a state will subordinate its will to that of another state, or to a common will of which its own is only a factor, except under the pressure of necessity or of vital needs, so that arrangements involving such subordination, like those made under compulsion at the end of a war, are taken altogether out of the category of ordinary treaties.

Other alleged grounds upon which a treaty may be voided.

Beyond the grounds afforded by these three conditions there is no solid footing upon which repudiation of treaty obligations can be placed. The other reasons for which it is alleged that states may refuse to execute the contracts into which they have entered resolve themselves into so many different forms of excuse for disregarding an agreement when it becomes unduly onerous in the opinion of the party wishing to escape from its burden. M. Heffter says that a state may repudiate a treaty when it conflicts with 'the rights and welfare of its people;' M. Hautefeuille declares that 'a treaty containing the gratuitous cession or abandonment of an essential natural right, such for example as part of its independence, is not obligatory;' M. Bluntschli thinks that a state may hold treaties incompatible

[1] De Martens, Précis, §§ 52, 56; Wheaton, Elem. pt. iii. ch. ii. § 10; Bluntschli, §§ 458, 460.

with its development to be null, and seems to regard the propriety of the denunciation of the treaties of 1856 by Russia as an open question[1]. The doctrine of M. Fiore exhibits the extravagancies which are the logical consequence of these views. According to him 'all treaties are to be looked upon as null, which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights;' and by the light of this principle he finds that if 'the numerous treaties concluded in Europe are examined they are seen to be immoral, iniquitous, and valueless[2].' Such doctrines as these may be allowed to speak for themselves. Law is not intended to bring licence and confusion, but restraint and order; and neither restraint nor order can be imposed by the principles of which the expression has just been quoted. Incapable in their vagueness of supplying a definite rule, fundamentally immoral by the scope which they give to unregulated action, scarcely an act of international bad faith could be so shameless as not to find shelter behind them. High-sounding generalities, by which anything may be sanctioned, are the favourite weapons of unscrupulousness and ambition; they cannot be kept from distorting the popular judgment, but they may at least be prevented from affecting the standard of law.

Renewal of treaties.

An extinguished treaty may be renewed by express or tacit consent. It is agreed that when the consent is tacit it must be signified in such a manner as to show the intention of the parties unmistakably[3]; and it may be added that in the case of the majority of treaties it would be hard to show intention tacitly beyond chance of mistake. In such a case no doubt as that put by Vattel, who supposes a treaty of subsidy to have been concluded for a term, on the expiration of which a sum equal to the annual amount of the subsidy is offered and taken, there can be no question that the parties tacitly agree to renew the treaty for

[1] Heffter, § 98; Hautefeuille, i. 9; Bluntschli, §§ 415 and 456.

[2] Nouv. Droit Int. 1re ptie, chap. iv.

[3] Vattel, liv. ii. ch. xiii. § 199; Heffter, § 99; Calvo, § 733; Fiore, §§ 1133–5.

PART II CHAP. X twelve months, and that the power receiving the money is bound for that time to render the services for which it is the payment. But in general, intention cannot be inferred with like certainty. If, for example, it is provided in a commercial treaty that certain duties shall be levied on both sides, and the parties continue after the expiration of the treaty to levy the duties fixed by it, it is manifest that there is nothing to show that the admission of goods by one party at a certain rate is intended to be dependent upon admission by the other party at a corresponding rate, still less that the condition, if intended, has been accepted; the conduct of both sides is consistent with volunteered action in their own interests independently of any agreement[1]. It would in fact be unsafe to assume a treaty to be tacitly renewed except in cases in which something is done or permitted which it cannot be supposed would have been done or permitted without such an equivalent as that provided in the treaty[2].

[1] It might perhaps be otherwise if the whole of a commercial treaty containing provisions of very various kinds continued to be observed. De Martens (quoted by Phillimore, iii. § dxxix) mentions in his treatise 'über die Erneuerung der Verträge' that more than one treaty of commerce entered into in the seventeenth century was in existence towards the end of the eighteenth century.

[2] Most writers devote considerable space to a classification of treaties. Vattel, for example, divides them into equal treaties, by which 'equal, equivalent, or equitably proportioned' promises are made, and unequal treaties in which the promises do not so correspond; personal treaties which expire with the sovereign who contracts them, and real treaties which bind the state permanently. De Martens arranges them under the heads of personal and real treaties, of equal and unequal alliances, and of transitory conventions, treaties properly so called, and mixed treaties. Of these last the first kind, being carried out once for all, is perpetual in its effects; the duration of the second, which stipulates for the performance of successive acts, is dependent on the continued life of the state and other contingencies; and the third partakes of both characters. Heffter divides them into (1) 'conventions constitutives, qui ont pour objet soit la constitution d'un droit réel sur les choses d'autrui, soit une obligation quelconque de donner ou de faire ou de ne faire point (e.g. treaties of cession, establishment of servitudes, treaties of succession); (2) conventions réglementaires pour les rapports politiques et sociaux des peuples et de leurs gouvernements (e.g. treaties of commerce); (3) traités de société (e.g. of alliance, or for the repression of the slave trade).' Calvo distinguishes treaties with reference to their form into transitory and permanent, with reference to their nature into personal and

real, with reference to their effects into equal and unequal, and simple and conditional, finally with reference to their objects into treaties of guarantee, neutrality, alliance, limits, cession, jurisdiction, commerce, extradition, &c.

It is not very evident in what way these and like classifications are of either theoretical or practical use. Vattel (liv. ii. ch. xii. §§ 172–97), De Martens (Précis, §§ 58–62), Heffter (§ 89), Calvo (§§ 643–68), Twiss (i. ch. xii), may however be consulted with respect to them.

It may be remarked that international law is not concerned with so-called personal treaties. Accidentally the state may be mixed up with them as a matter of fact when it is identified with the sovereign, but this does not affect the question of principle. Either a treaty is such that one of the two contracting parties must be supposed to have entered into it with a state as the other party, in which case it is 'real' and not terminable with the death or change of the sovereign, or else it is such that it must be supposed to have been entered into with the sovereign in his individual capacity, in which case it never affects the state except in so far as the individual who happens to be sovereign is able to use the resources of the state for his private purposes.

CHAPTER XI

AMICABLE SETTLEMENT OF DISPUTES; AND MEASURES OF CONSTRAINT FALLING SHORT OF WAR

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Modes of settling disputes amicably.

DISPUTES can be amicably settled either by direct agreement between the parties, by agreement under the mediation of another power, or by reference to arbitration. The last of these modes is the only one of which anything need be said, the other two being obviously outside law.

Arbitration.

When two states refer a disputed matter to arbitration, the scope and conditions of the reference are settled by a treaty or some other instrument of submission. Among the conditions are sometimes the rules or principles which are to be applied in the case. When no such rules or principles are laid down the arbitrators proceed according to the rules of civil law, unless, as is sometimes the case, they agree to be bound by special rules framed by themselves. To form the arbitrating tribunal the litigating states either choose a sovereign or other head of a state as sole arbitrator, or they fix upon one or more private persons to act in that capacity, or finally they commit to foreign states the choice of either the whole or part of a body of arbitrators. When more than one person is appointed it is usual either to make the number uneven, or to nominate a referee with whom the decision lies in case of an equal division of votes. If no such precaution is taken, and an equal division of votes occurs, the arbitration falls to the ground. When the head of a state is chosen as arbitrator it is not understood that he must examine into and decide the matter personally; he may, and generally does, place the whole affair in the hands of persons designated by him, the decision only being given in his name. Private persons on the other hand cannot delegate the functions which have been confided to them. The arbitrating person or body forms

a true tribunal, authorised to render a decision obligatory upon the parties with reference to the issues placed before it. It settles its own procedure, when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices.

An arbitral decision may be disregarded in the following cases; viz. when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal. Some writers add that the decision may also be disregarded if it is absolutely contrary to the rules of justice, and M. Bluntschli considers that it is invalidated by being contrary to international law; he subsequently says that nothing can be imposed by an arbitral decision which the parties themselves cannot stipulate in a treaty. It must be uncertain whether in making this statement he intends to exemplify his general doctrine or to utter it in another form. Whatever may be the exact scope of these latter reserves, it is evident that an arbitral decision must for practical purposes be regarded as unimpeachable except in the few cases first mentioned; and that there is therefore ample room for the commission, under the influence of sentiment, of personal or national prejudices, of erroneous theories of law, and views unconsciously biassed by national interests, of grave injustice, for which the injured state has no remedy. It may be observed also that it must always be difficult for a state to refuse to be bound by an arbitral award, however unjust it may be. The public in foreign states will seldom give itself the trouble to form a careful judgment in the facts; it will prefer the simple course of assuming that arbitrators are probably right; a state by rejecting an award may stir up foreign public opinion against itself; and this it is not worth while to do unless very grave issues are involved. It must in these circumstances be permissible to distrust arbitration as a means of obtaining an equitable settlement of international controversies;

PART II CHAP. XI at the same time it is to be admitted that where the matter at stake is unimportant, and the questions involved are rather pure questions of fact than of law or mixed fact and law, reference to arbitration is often successful, both as a means of securing that justice shall be done, and of allaying international irritation. Of the arbitral decisions which have been delivered during the last hundred years upon relatively unimportant matters, very few are open to serious criticism; and more than one have settled disputes out of which a good deal of ill feeling might have arisen. It is unfortunate that both the proceedings and the issue in the most important case of arbitration that has yet occurred [namely, that arising out of the Alabama Claims] were little calculated to enlarge the area within which confidence in the results of arbitration can be felt. [On the other hand, both in the recent case of the Behring Sea Fur Seal Fisheries and the still more recent instance of the Venezuela Boundary, recourse has been had to arbitration with conspicuous success[1], and the arbitral method of settling international differences has acquired new authority from the dignity and ability that marked the course of the proceedings[2].

[1] See antea, pp. 111-113, 149.

[2] Vattel, liv. ii. ch. xviii. § 329; Heffter, § 109; Phillimore, iii. § iii; Calvo, §§ 1512-32; Bluntschli, §§ 488-98; Fiore, §§ 1478-91. A scheme of arbitral procedure drawn up by a Committee of the Institute of International Law, was adopted at the meeting of the Institute held at the Hague in 1875; see Annuaire de l'Institut de Droit International for 1877, pp. 123-33. Calvo (§§ 1489-1510) gives a list of twenty-one disputes settled by arbitration from 1794 onwards. Four later examples may be found in the Rev. de Droit Int. xix. 196 and xx. 511. One is a case of compensation for ill-treatment of a foreigner; three are cases of doubtful boundary; one is unimportant, the other three are concerned only with matters of fact. They are therefore cases which are eminently fitted to be settled by arbitration if there is good faith on both sides, and the arbitrator can be trusted to be equitable. In these instances there is no reason to doubt that arbitration will be successful; but the rejection by the United States in 1831 of the award given against it in the matter of the British-American boundary shows how little calculated the method is to put an end to disputes of any magnitude unless honesty of intention exists on every hand. [Mr. John Bassett Moore, in his 'History and Digest of the International Arbitrations to which the United States has been a party,' has compiled a list of arbitral decisions in general up to the year 1898; see pp. 4821, 4851 et seq.

On the 29th of July, 1899, a convention for the pacific settlement of international disputes was signed by the representatives of twenty-four of the states assembled at the Hague on the initiative of the Czar to consider the practicability of a reduction of international armaments and of the substitution of pacific methods for force and violence in the sphere of foreign relations. Under that convention a Permanent Court of Arbitration, with an official staff, is constituted at the Hague, while the signatary powers are each to designate not more than four representatives to act as arbitrators in case of need, and as such to be enrolled as members of the court. Should disputes arise between any of the parties to the convention the court is always at their disposal, and recourse may be had to it even by contestants who have not signified their adhesion to the convention. The powers who signed were Germany, Austria, Belgium, Denmark, Spain, the United States, Mexico, France, Great Britain, Italy, Japan, Luxembourg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, and Bulgaria. The Republics of Salvador, Guatemala, and Uruguay as well as the Empire of Corea have subsequently requested to be admitted to the benefits of the convention.

The tribunal which has so recently made its award in the case of the disputed Alaskan boundary was in all essentials a Court of Arbitration, though its constitution was unusual. It consisted of 'six impartial jurists of repute, who should consider judicially the questions submitted to them,' nominated in equal numbers by the British Sovereign and the President of the United States. No provision was made for the contingency of an equal division of votes, though the fact that the Commissioners appointed were three British and three American subjects rendered such an event by no means improbable. In the result a bare majority of four was obtained, and the two Commissioners who formed the minority, both Canadians, declined to sign the award. This fact, though unfortunate, did not of course affect its validity. The serious blot on the proceedings was the manner in which the United States chose to construe the term 'impartial jurists of repute'; and though the amicable settlement of a dispute of long standing is a matter for congratulation, it seems improbable that recourse will again be had to a court similarly composed. The full text of the award will be found in the Times of October 21, 1903; the reasons of the Canadian Commissioners for refusing to append their signatures are contained in the issue of the following day.]

Up to the present date only one judgment has been pronounced by the Permanent Court of Arbitration, and that in a dispute of long standing between the United States and Mexico relating to 'The Pious Fund of the Californias,' but the court is at this moment sitting to decide certain questions of preferential treatment arising out of the claims made by Great Britain, Italy, and Germany against Venezuela. Under a treaty signed at Tokio in August, 1902, the interpretation of various disputed clauses in treaties between Japan, Great Britain, France, and Germany are to go before the Hague Tribunal; and on October 14, 1903, an agreement was entered into between the English and French Governments, providing that questions of a judicial character or relating to the interpretation of existing treaties which might arise between the two countries should, if found incapable of settlement by diplomatic means, be referred to the same Court of Arbitration.

The existence of such a permanent body provides a convenient machinery for the settlement of international disputes of a minor order, and we may safely predict that recourse will be had to it with growing frequency and success, while its decisions, both final and interlocutory, will tend to furnish a body of precedents possessing value and authority in the conduct of international controversy. Whether there is any reasonable prospect of the Hague Tribunal being invoked in cases where questions of magnitude, or involving popular prejudices, are at stake time alone can show. The omens as yet are scarcely propitious; and in the Anglo-French agreement mentioned in the last paragraph it is expressly stipulated that the method of arbitration shall apply only to such questions as do not involve the vital interests, the independence, or the honour of the two contracting parties[1].]

[1] [The text of the Hague Convention will be found in De Martens, Nouv. Rec. Gén. 2e Sér. xxvi. 920–48. For additional information I am indebted to Dr. L. H. Ruyssenaers, Secretary-General of the Permanent Court of Arbitration. In the Recueil Général of De Martens, China and Turkey appear among the signataries, but Dr. Ruyssenaers does not include them in

A reference to arbitration falls to the ground on the death of an arbitrator, unless provision for the appointment of another has been made, and on the conclusion of a direct agreement between the parties by way of substitution for the reference. [The Hague Convention provides for the substitution of a fresh arbitrator in cases of death, resignation, or removal.]

Of the measures falling short of war which it is permissible to take, retorsion and reprisal are the subjects of longest custom.

Retorsion.

Retorsion is the appropriate answer to acts which it is within the strict right of a state to do, as being general acts of state organisation, but which are evidence of unfriendliness, or which place the subjects of a foreign state under special disabilities as compared with other strangers, and result in injury to them. It consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated. Thus if the productions of a particular state are discouraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbours by like laws and tariffs [1].

Reprisal.

Reprisals are resorted to when a specific wrong has been committed; and they consist in the seizure and confiscation of property belonging to the offending state or its subjects by way of compensation in value for the wrong; or in seizure of property or acts of violence directed against individuals with the object of compelling the state to grant redress; or, finally, in the suspension of the operation of treaties. When reprisals are not directed against property they usually, though not necessarily, are of identical nature with, or analogous to, the act by which they have been provoked. Thus for example, when Holland in 1780 repudiated the treaty obligation, under which she lay, to

his list of the powers that have ratified. The adhesion of Turkey to the principle of arbitration was clogged by a declaration which robbed it of all value (Nouv. Rec. Gén. l. c. p. 737); the course of events in China since the summer of 1899 is sufficient explanation for its non-appearance.]

[1] De Martens, Précis, § 254; Phillimore, iii. § vii; Bluntschli, § 505.

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succour England when attacked, the British government exercised reprisals by suspending 'all the particular stipulations concerning freedom of navigation and commerce, &c. contained in the several treaties now existing between his majesty and the republic[1].'

Such measures as those mentioned are *primâ facie* acts of war; and that they can be done consistently with the maintenance of peace must be accounted for, as in the case of like acts done in pursuance of the right of self-preservation, by exceptional reasons. The reasons however in the two cases are very different. In the one they are supplied by urgent necessity; in the other there is not only no necessity, but as a rule the acts for which reprisals are made, except when reprisals are used as a mere introduction to war, are of comparative unimportance. It is this which justifies their employment. They are supposed to be used when an injury has been done, in the commission of which a state cannot be expected to acquiesce, for which it cannot get redress by purely amicable means, and which is scarcely of sufficient magnitude to be a motive of immediate war. A means of putting stress, by something short of war, upon a wrong-doing state is required; and reprisals are not only milder than war, since they are not complete war, but are capable of being limited to such acts only as are the best for enforcing redress under the circumstances of the particular case. It of course remains true that reprisals are acts of war in fact, though not in intention, and that, as in the parallel instances of intervention and of acts prompted by the necessities of self-preservation, the state affected determines for itself whether the relation of war is set up by them or not. If it elects to regard them as doing so, the outbreak of war is thrown back by the expression of its choice to the moment at which the reprisals were made.

The forms of reprisals most commonly employed in recent times consist in an embargo of such ships belonging to the

[1] Declaration of the Court of Great Britain, 17th April, 1780. Ann. Regist. for 1780, p. 345.

offending state as may be lying in the ports of the state making reprisal, or in the seizure of ships at sea, or of any property within the state, whether public or private, which is not entrusted to the public faith. Embargo is merely a sequestration. Vessels subjected to it are consequently not condemned so long as the abnormal relations exist which have caused its imposition. If peace is confirmed they are released as of course; if war breaks out they become liable to confiscation[1]. It is not necessary that vessels, or other property, seized otherwise than by way of embargo, should be treated in a similar manner. They may be confiscated so soon as it appears that their mere seizure will not constrain the wrong-doing state to give proper redress. In recent times however instances of confiscation do not seem to have occurred, and probably no property seized by way of reprisal would now be condemned until after the outbreak of actual war.

Embargo by way of reprisal.

A somewhat recent case of reprisals by way of combined seizure and embargo is afforded by the proceedings taken by England against the Two Sicilies in 1839. A sulphur monopoly had been granted by the latter country to a French company in violation of a treaty of commerce made with Great Britain in

Reprisals made by England upon the Two Sicilies in 1839.

[1] The doctrine of the English courts with respect to the effect of embargo was laid down by Lord Stowell in the case of the Boedes Lust (v Rob. 246). The seizure of Dutch property under an embargo in 1803 was, he said, 'at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, and so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus by which it is done; that it was done hostili animo, and is to be considered as a hostile measure, ab initio, against persons guilty of injuries which they refuse to redeem by any amicable alteration in their measures. This is the necessary course, if no particular compact intervenes for the restoration of such property taken before a formal declaration of hostilities.' It may be questioned whether this doctrine is not unnecessarily artificial. To imagine a hostile animus at the moment of capture is surely needless when the property has undoubtedly acquired an enemy character at the time of condemnation through the fact that war has broken out.

1816. The revocation of the grant was demanded and refused; upon which the English government decided to make reprisals, and the admiral commanding the Mediterranean fleet was ordered 'to cause all Neapolitan and Sicilian ships which he might meet with either in the Neapolitan or Sicilian waters to be seized and detained, until such time as notice should be received from her Majesty's minister at Naples that this just demand of her Britannic Majesty's government had been complied with.' A number of vessels were captured accordingly, and an embargo was at the same time laid on all ships at Malta bearing the flag of the Two Sicilies. These measures not being intended to amount to war, or to be introductory to it, the English minister was directed to remain at Naples; and he in fact remained there notwithstanding that a counter embargo was laid on British vessels by the Sicilian government. The affair was ultimately composed under the mediation of France; the grant of the monopoly being rescinded, the vessels seized and embargoed by England were restored to their owners.

Acts which may be done by way of reprisal.

It must not be assumed that forms of reprisal other than the above are improper because they have for a long time been rare. The justification of reprisals being that they are the means of avoiding the graver alternative of war, it must in principle be conceded that anything short of complete war is permissible for sufficient cause. Remedies must vary in stringency with the seriousness of the injuries which call for their application. If however on the one hand the acts which may be done by way of reprisals cannot be kept within any precise bounds, on the other they stray so widely from the ordinary rules of peace that the burden of showing their necessity, and still more the necessity that they shall be of a given severity, is thrown upon the state making use of them. To make reprisals either disproportioned to the provocation, or in excess of what is needed to obtain redress, is to commit a wrong; and, to judge from the amount of feeling which has been shown with respect to some cases in which it was commonly thought that the action taken was in

excess of the occasion, it may be added that the wrong is one which there is less disposition to judge leniently than there is to pardon offences of a much more really serious nature[1].

Pacific blockade.

Since the beginning of the nineteenth century what is called pacific blockade has been not infrequently used as a means of constraint short of war. The first instance occurred in 1827, when the coasts of Greece were blockaded by the English, French and Russian squadrons, while the three powers still professed to be at peace with Turkey. Other like blockades followed in rapid succession during the next few years. The Tagus was blockaded by France in 1831, New Granada by England in 1836, Mexico by France in 1838, and La Plata from 1838 to 1840 by

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. c. xxiv; Vattel, liv. ii. ch. xviii. §§ 342–54; De Martens, Précis, §§ 255–62; Ortolan, Dip. de la Mer, liv. ii. ch. xvi; Heffter, § 110; Twiss, ii. §§ 11–20; Calvo, §§ 1568–89; Bluntschli, §§ 500 and 502–4.

Much of what appears in the older and even in some modern books upon the subject of reprisals has become antiquated. Special reprisals, or reprisals in which letters of marque are issued to the persons who have suffered at the hands of the foreign state, are no longer made; all reprisals that are now made may be said to be general reprisals carried out solely through the ordinary authorised agents of the state, letters of marque being no longer issued.

It is not a little startling to find M. Bluntschli enumerating amongst forms of reprisal, the sequestration of the public debts of the state, and the arrest of subjects of the state offering provocation who may happen to be within the jurisdiction of the state making reprisals. It is true that as regards sequestration M. Bluntschli at first limits the right of making such reprisals to the case of the seizure by the wrong-doing state 'des biens possédés sur son territoire par des citoyens de l'autre état;' but since he goes on to mention the notorious case of the sequestration of the Silesian loan by Frederic II as an example of such reprisals, and as legitimate, he cannot intend to be bound by his general statement of law. As reprisals fall short of war, acts cannot be legitimate by way of reprisal which are not permitted even in war. It is well established that the action of Frederic II was in every way a gross violation of the then accepted law, and the principle that debts due by the state are inviolable in time of war has certainly not lost authority since his time. The arrest of foreigners as hostages is equally opposed to the unquestioned modern rule. Of course these or any other acts may be done by way of retaliation for identical acts already done by the other state; but M. Bluntschli's meaning is evidently not this; moreover such reprisals would be of the nature of hostile reprisals, that is to say, of reprisals made in order to restrain the commission of acts illegitimate according to the rules of war.

France, and from 1845 to 1848 by France and England; the Greek ports were blockaded by England in 1850, and Rio de Janeiro by the same power in 1862. From the last-mentioned year no fresh instance occurred until 1884, when France blockaded a portion of the coast of Formosa. In 1886 Greece was blockaded by the fleets of Great Britain, Austria, Germany, Italy and Russia. [And in 1897 the 'concert of Europe,' represented by the fleets of Great Britain, Austria, France, Germany, Italy, and Russia, blockaded the Island of Crete where an armed insurrection was raging and where a detachment of Greek regular troops had been landed. Finally, in 1902 Venezuela was blockaded by Great Britain and Germany. The fact that in both these last cases it was found necessary by the blockading fleets to fire on the inhabitants of the blockaded territory makes 'pacific' a word of doubtful applicability.]

The manner in which these blockades have been carried out has varied greatly. During the blockade of Mexico by France in 1838, not only were Mexican ships held liable to capture, but vessels belonging to third powers were seized and brought in for condemnation[1]. In the other early instances of pacific blockade the vessels both of the state operated against and of other powers were sequestrated, and were restored at the termination of the blockade, no compensation being given to foreign ships for loss of time and expenses. In 1850 Great Britain adopted a milder course; Greek vessels only were seized and sequestrated, and even Greek vessels were allowed to enter with cargoes *boná fide* the property of foreigners, and to issue from port if chartered, before notice of the blockade was given, for the conveyances of cargoes wholly or in part

[1] This is believed to be the only occasion on which vessels of third powers have been confiscated; though, if the pacific character of the Formosan blockade had been omitted, and neutral vessels had been seized, they would have been treated, it would seem, in like manner. M. F. de Martens, in his recent work (Traité de Droit Int. iii. 174), has been misled by M. Hautefeuille into saying that 'l'Angleterre ne laisse passer ni les navires de l'État bloqué ni les navires neutres; elle confisque les uns et les autres.' The statement is entirely destitute of foundation.

belonging to foreigners[1]. In 1886 this precedent was followed[2]; but the blockade of Formosa in 1884 was intended to be enforced in a very different spirit. The French government disavowed any wish to assume the character of a belligerent, but it proposed to treat neutral vessels as liable to capture and condemnation; it was anxious to retain the privilege of coaling its fleet at Hongkong, while it enjoyed the powers attendant upon a hostile blockade. Lord Granville refused to assent to conduct so inequitable towards China, and intimated that he should consider the hostilities which had in fact taken place, together with the formal notice of blockade, to constitute a state of war[3].

[1] State Papers, xxxix.

[2] The instructions given to the British Admiral were to detain every ship under the Greek flag coming out from or entering any of the blockaded ports or harbours, or communicating with any ports within the limit blockaded. 'Should any parts of the cargo on board of such ships belong to any subject or citizen of any foreign power other than Greece, and other than "Austria, Germany, Italy and Russia," and should the same have been shipped before notification of the blockade, or after such notification, but under a charter made before the notification, such ship or vessel shall not be detained. The officer who boards will enter in the log of any ship allowed to proceed the fact of her having been visited and allowed to proceed; also date and at what place such visit occurred. . . . In case of detention steps must be adopted as far as practicable to insure safety of ship and cargo.' Parl. Papers, Greece, No. 4, 1886. Incidentally some occurrences perhaps took place which must have been beyond the intended action of the powers. For example, it is alleged that at Skiathos part of the Austrian squadron made requisitions of provisions on the island, carrying off so much flour as to exhaust the stock, and that it also cut telegraphic communication, and seized fishing boats. There seems however to be much doubt as to the truth of the allegation. [In 1902 Great Britain reverted to the stricter custom, and it was notified that vessels attempting to violate the blockade rendered themselves 'liable to all measures authorised by the law of nations and the respective treaties between His Majesty and the different neutral powers.' (Parl. Papers, No. 1 (1903), p. 131.) Though the blockade was thus made applicable to all nationalities there does not appear to have been any seizure of vessels not flying the Venezuelan flag. The blockade was rendered effective from the day of publication (Dec. 20), but fifteen days of grace were allowed for vessels 'lying in ports now declared to be blockaded,' and varying periods were granted to steamers and sailing vessels which had left harbour prior to notification.]

[3] 'The contention of the French government that a "pacific blockade" confers on the blockading power the right to capture and condemn the ships

PART II
CHAP. XI

Between blockades so different in their incidents there is little in common. With regard to those under which vessels of third powers are condemned or even sequestrated, the question arises whether a state in time of peace can endeavour to obtain redress from a second state for actual or supposed injuries by means which inflict loss and inconvenience upon other countries. In England at any rate it was soon thought not. In 1846, Lord Palmerston said in writing to Lord Normanby, the ambassador at Paris, with reference to the blockade of La Plata, 'The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a state you have no right to prevent ships of other states from communicating with the ports of that state—nay, you cannot prevent your own merchant ships from doing so. I think it important therefore, in order to legalise retrospectively the operations of the blockade, to close the matter by a formal convention of peace between the two powers and Rosas [1].' To this language there is nothing to add, except an expression of surprise that the subject could have ever presented itself to any mind in a different light. No state can expect another to submit to annoyance, still less to loss, for its mere convenience. It is only under the supreme necessities of war, when the gain or loss of belligerent states is wholly out of proportion to the loss inflicted upon neutral individuals, that other states can be reasonably asked to forego their right of intercourse with the enemy. If a country itself professes that its quarrel is not serious or dangerous enough to make recourse to hostilities necessary, its needs cannot be so urgent as to justify

of third nations for a breach of such a blockade is in conflict with well established principles of international law.' Lord Granville to M. Waddington, Nov. 11, 1884; Parl. Papers, France, No. 1, 1885.

[1] Lord Dalling's Life of Lord Palmerston, iii. 327.

a demand for privileges conceded only upon the ground of necessity and danger.

The practice however assumes a very different aspect when it is so conducted as to be harmless to the interests of third powers. It is a means of constraint much milder than actual war, and therefore, if sufficient for its purpose, it is preferable in itself. It is true that its very mildness may tempt strong powers to employ it against weak countries on occasions when, if debarred from its use, they would not resort to hostilities; but it is not to be forgotten that weak countries sometimes presume upon their weakness, and that the possibility of taking measures against them less severe than war may be as much to their advantage as to that of the injured power. Moreover the circumstances of the Greek blockade of 1886 show that occasions may occur in which pacific blockade has an efficacy which no other measure would possess. The irresponsible recklessness of Greece was endangering the peace of the world; advice and threats had been proved to be useless; it was not till the material evidence of the blockade was afforded, that the Greek imagination could be impressed with the belief that the majority of the Great Powers of Europe were in earnest in their determination that war should be avoided.

Pacific blockade, like every other practice, may be abused. But, subject to the limitation that it shall be felt only by the blockaded country, it is a convenient practice, it is a mild one in its effects even upon that country, and it may sometimes be of use as a measure of international police, when hostile action would be inappropriate and no action less stringent would be effective [1].

[1] Pistoye et Duverdy (Traité des Prises Maritimes, ii. 376–8), and Woolsey (§ 119), deny the existence of a right to enforce pacific blockade, but their minds were fixed upon its earlier form. Heffter (§ 111), Calvo (§ 1591), and Cauchy (ii. 428) pronounce in favour of it. Bluntschli (§§ 506–7) approves of the practice on condition that the blockade shall be so conducted as not to touch third states. Von Bulmerincq (Holtzendorff's Handbuch, 1889, vol. iv. § 127) unwillingly admits it as being at any rate a less evil than war. The opinions of many recent writers will be found summarised by von

PART II CHAP. XI

Embargo in contemplation of war.

It was formerly common to place ships of a foreign power under embargo, not by way of reprisals, but in contemplation of war, in order to make sure of having enemy's property, of a kind liable to condemnation, under command at the outbreak of hostilities. The practice has happily not been followed as a preliminary to recent wars. On the contrary, a tendency has been shown to found a custom not only of permitting ships to leave, but of giving a time of grace for lading and reaching their port of destination. As is remarked by Sir Travers Twiss, 'An embargo which is made merely in contemplation of war under circumstances in which reprisals could not justly be granted,' or, it may be added, whether they could or could not be justly granted, so long as the embargo does not in fact purport to operate by way of reprisals, 'cannot well be distinguished from a breach of good faith to the parties who are the subject of it[1].'

Bulmerincq. In 1887 the Institut de Droit International, twenty-seven members being present, adopted the following 'declaration' on the subject of Pacific Blockade:—'L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes :

1°. Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

2°. Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante.

3°. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans dédommagement à aucun titre.' Annuaire de l'Institut, 1887–8, p. 300.

[1] Twiss, ii. § 12; Calvo, § 1583. M. Bluntschli (§ 509) condemns embargo in contemplation of war unless its object is 'd'avoir sous la main un nombre de navires suffisant pour user de représailles envers un ennemi qui abuserait du droit de prises maritimes.' M. Bluntschli seems always ready to support any practice, however doubtful its legality, or undoubted its illegality, which can be used to injure or embarrass captors of private property at sea.

PART III

CHAPTER I

COMMENCEMENT OF WAR

PART III
CHAP. I
Whether the issue of a declaration or manifesto before the commencement of hostilities is necessary.

On the threshold of the special laws of war lies the question whether, when a cause of war has arisen, and when the duty of endeavouring to preserve peace by all reasonable means has been satisfied, the right to commence hostilities immediately accrues, or whether it is necessary to give some preliminary notice of intention. *A priori* it might hardly be expected that any doubt could be felt in the matter. An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defence, and it is needless to say that no one asserts such quixotism to be obligatory. Nevertheless a declaration in some form is insisted upon by the majority of writers, and it has sometimes been treated as being so essential to the justice of hostilities that a neglect to issue one has supplied an excuse for a good deal of unnecessary invective against one at least of the states which at various times have dispensed with it.

The opinion that the date of the commencement of war must be indicated by a formal notification appears to rest upon the idea that without such a notification the date of commencement must be uncertain. As between belligerents however—and the subject is being considered here solely as between belligerents—no uncertainty need exist. The date of the commencement of a war can be perfectly defined by the first act of hostility. A more real doubt used formerly to arise from the very fact that declarations

were commonly issued. In the eighteenth century declarations were frequently published several months after letters of marque had been granted, after general reprisals had been ordered, and even after battles had been fought; and disputes in consequence took place as to whether war had begun independently of the declaration, or from the date of the declaration, or in consequence of the declaration, but so as to date, when once declared, retrospectively to the time of the first hostilities. As the legitimacy of the appropriation of private property depends upon the existence of a state of war, it is evident that conflicts of this nature were extremely embarrassing and, where different theories were in play, were altogether insoluble. To take the state of war on the other hand as dating from the first act of hostility, only leads to the inconvenience that in certain cases, as for example of intervention, a state of war may be legally set up through the commission of acts of hostility, which it may afterwards appear that the nation affected does not intend to resent by war; and, as in such cases the nation doing hostile acts can always refrain from the capture of private property until the question of peace or war is decided, the practical inconvenience is small.

History of practice.

It may be suspected that the writers who in recent times have maintained the necessity of notification of some kind have been unconsciously influenced by the merely traditional force of ideas which belong to a period anterior to international law, and which are of little value under the conditions of modern war. During the middle ages, and down to the sixteenth century, direct notice of war was always given to an intended enemy, in the earlier times by letters of defiance, and latterly by heralds. Whether the practice had a distinct origin, or whether it descended from the fetial law of the Romans, is immaterial; it was at any rate of undisputed authority, and, owing to the way in which war was then made, it was of great value in its time. When therefore it began to die away in the transition from mediæval to modern civilisation, it is not surprising that the conception of right which it had so long embodied should reappear in another

shape; and it happened that by leaning on natural law and on the growing authority of Roman custom it was able to secure vigorous allies. The practice of sending heralds was disused in the beginning of the seventeenth century, but Albericus Gentilis had already cited Roman usage in support of the assertion that the voice of God and Nature ordered men to renounce friendship expressly before embarking in war; and Grotius, though seeing clearly that express notification is useless, when it is once understood that demands made on one side will not be granted on the other without war, allowed himself in describing the 'conditional declaration' which he held to be commanded by natural law, to be tied down by ancient precedent, and especially by fetial forms, to a demand for reparation coupled with notice of war in case of non-compliance[1]. Zouch, in laying down that declaration is necessary, relies only upon fetial law. Pufendorf barely states that war must be duly proclaimed; but if the language of his predecessors be kept in mind, there can be little doubt as to the intention of his doctrine. Cocceius regards declaration as only necessary before an offensive war[2]. Thus in the seventeenth century the theoretical assertion of the necessity of declaration was continuous and nearly universal; but the views and habits of men of action are better represented in a passage of Molloy than in the pages of Grotius or Pufendorf. 'A general war,' he says, 'is either solemnly denounced or not solemnly denounced; the former is when war is solemnly declared or proclaimed by our king against another state. Such was the Dutch war, 1671. An unsolemn war is when two nations slip into a war without any solemnity; and ordinarily happeneth among us. Again, if a foreign prince invades our coasts, or sets upon the king's navy

[1] Alb. Gent. De Jure Belli, lib. ii. cap. i; Grotius, De Jure Belli et Pacis, lib. iii. cap. iii. §§ 6 and 7. The latest instances of the employment of a herald were in 1635, when Louis XIII sent one to Brussels to declare war against Spain, and in 1657, when Sweden declared war against Denmark by a herald sent to Copenhagen. Twiss, ii. § 32.

[2] Zouch, Juris Fecialis Explicatio, pars 1. sect. 6; Pufendorf, bk. viii. c. vi. § 9; Cocceius, note to Grotius, lib. iii. cap. iii. § 6.

at sea, hereupon a real, though not solemn war may, and hath formerly, arisen. Such was the Spanish invasion in 1588. So that a state of war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it[1].' The distinction which is here drawn between solemn and unsolemn war is indicative of the tenacity of life which is shown by forms; and the history of the eighteenth century shows how powerless in this case they really were. They inspired sufficient respect to prevent prizes taken before declaration of war from being condemned until after declaration took place, and it was perhaps worth while to endeavour to excite odium against

[1] De Jure Maritimo, bk. i. c. 1.

Most of the wars of the seventeenth century began without declaration, though in some cases declarations were issued during their continuance. Gustavus Adolphus began and carried on his war against the Emperor without declaration (Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, and Ward, An Enquiry into the Manner in which the different Wars in Europe have commenced, 11); in 1652 Blake and Tromp fought in the Downs before manifestos were issued, and in 1654 the expedition of Penn and Venables sailed for the West Indies without notice to Spain (Lingard, Hist. of England, xi. 153 and 257): from 1645 to 1657 the Dutch and the Portuguese fought in Brazil, in Africa, and in Ceylon, and it was not till the latter year that war was formally declared (De Garden, Hist. des Traités de Paix, i. 61-2); for a year before the English declared war against the Dutch in 1665 the latter ravaged British commerce in the Indies and the former were engaged in conquering the Dutch establishments in Africa and America (Lingard, xii. 116, &c., or De Garden, ii. 46); the letter in which Louis XIV in 1667 announced his intention to take possession of the Spanish Netherlands 'sans que la paix soit rompue de notre part' was rather a piece of insolence than a compliance with any supposed duty of declaring war (Martin, Hist. de France, xiii. 315); finally in 1688, when war broke out between France and the Empire, Kaiserslautern was taken by the French on the 20th September, and the declaration of war was dated at Versailles on the 24th of the same month (Ward, 18).

Of the foregoing wars the expedition sent by Cromwell against the Spanish West Indies was little better than filibustering, and in many cases as much damage as possible was done to commerce before purely military or naval operations began. The occurrence of such incidents as the former, and the uncertainty induced by sudden attacks upon commerce, were no doubt a chief cause of the inclination to represent the issue of a declaration as a necessity; but the evil was really in the manners of the time, and it could not have been cured by an alteration of form. A declaration which could be issued at the very moment of attack (Grotius, lib. iii. cap. iii. § 13) could be no safeguard against unscrupulous conduct.

a nation by accusing it of not observing due formalities[1]; but wars constantly began without declaration so long as the custom of using declarations continued, and when after the Seven Years' War a practice of publishing manifestos within the country beginning the war, and of communicating them to neutral states, was substituted for direct presentation of a declaration to the enemy, wars were begun without manifestos[2]. The majority of writers however continued to repeat that declaration is necessary[3].

[1] Austria, for example, made use in this way of the absence of any declaration on the occasion of the invasion of Silesia by Prussia in 1740.

[2] The War of Succession began in 1701; the Emperor's declaration appeared on the 15th May, 1702, and that of the King of France in the following July; in 1718 the Spaniards occupied Sardinia and attacked Sicily without declaration, the Spanish fleet was destroyed by the English at Cape Passaro in August of the same year and war was declared in December; in 1740 Frederic invaded Silesia two days before his ambassador arrived at Vienna to demand the surrender of the province, no demand having been at any time previously made, so that the Austrian court was ignorant of the existence of even a ground of quarrel; in 1744 an action was fought off Toulon between the English and French fleets in February and declarations were not issued till the end of March (Ward, 19–30); in 1747 the French entered Holland without declaring war (Moser, Versuch, ix. 67); before English and French declarations were exchanged in May and June, 1756, war had been waged for two years in America, and it had become maritime since June 1755; that Frederic II on invading Saxony in 1756 pretended to have no hostile intention did not alter the fact that his conduct was only consistent with war,—he blockaded the Saxon army in Pirna, he occupied the whole country, and he caused the taxes to be paid to himself (Lord Mahon's Hist. of England, ch. xxxiii); in 1778 the expedition of D'Estaing sailed for America in April without any declaration or manifesto on the part of France, and it was the accident of a slow voyage which prevented him from surprising the English, as he had intended, in the Delaware, where he arrived on the 7th July. A declaration was issued at Versailles on the 28th of that month (Ward, 42, and Marten, Hist. de France, xvi. 433).

Col. (now Major-General Sir Frederick) Maurice, in his 'Hostilities without declaration of War,' has made a valuable collection of all the instances from 1700 to 1870 in which acts of violence have been directed against a state without previous intimation of intention. From the scientific point of view it might have been wished that he had distinguished between cases of war properly so called, and cases of intervention, of attacks by unauthorized forces, &c., but in its practical aspects the collection is none the less useful for its indiscriminate inclusion; it proves more clearly than a stricter enumeration would show, how difficult it often is to be sure whether or not a state of war exists.

[3] Wolff, Jus Gentium, § 710; Burlamaqui (1694–1678), vol. ii. pt. iv. c. iv. §§ 15–18 is logical, and says that an enemy ought not to be attacked

PART III CHAP. I

Opinions of jurists in the present century.

In the present century the views of jurists are more divided. To M. Hautefeuille the necessity of a declaration made direct to the state against which an attack is intended seems to be incontestible, and all hostile acts done before its issue are 'flagrant violations of "le droit primitif."' It is difficult to say whether Heffter looks upon a direct declaration as a necessity in law or only as the preferable practice. M. Calvo, in spite of some inconsistencies of language, appears to regard declaration as obligatory. Riquelme thinks that a manifesto is indispensable to the regularity of war as between the belligerents, though, as it is not addressed specifically to or served upon one by the other, it is not easy to see how it can act as a notice. M. Bluntschli considers that the intention to make war must be notified to an enemy, but holds that notification is effected by the publication of a manifesto, and also that in a defensive war no declaration is required, and that a war undertaken for defensive motives is a defensive war notwithstanding that it may be militarily offensive. It would probably be seldom that a state adopting this doctrine would feel itself obliged to publish a manifesto. Wheaton says that 'no declaration or other notice to the enemy of the existence of war is necessary in order to legalise hostilities,' but he is sufficiently influenced by the conception of a difference between solemn and unsolemn war to believe that without a manifesto 'it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.' Klüber and Twiss consider that the practice of giving notice of hostility to an enemy ceased with the disuse of declarations in the middle of last century, and think with Phillimore that manifestos are

immediately after declaration of war, 'otherwise the declaration would only be a vain ceremony;' Vattel (liv. iii. ch. iv. §§ 51–60) also pronounces for declaration, but he allows it to be issued after the enemy's territory has been entered. Bynkershoek (Quæst. Jur. Pub. lib. i. c. ii) and Heineccius (Elem. Jur. Nat. et Gent. lib. ii. § 199) pronounced for the legitimateness of beginning war without declaration.

intended for the information of neutrals and of the subjects of the state issuing them, and that no obligation to declare war now exists as between the enemy states[1]. Practice on the other hand has been less variable than formerly. The United States began war with England in 1812, and with Mexico in 1846, without either notice or manifesto; Piedmont opened hostilities against Naples in 1860 in like manner; and the war between France and Mexico in 1838, beginning in a blockade instituted by the former country which the latter chose to consider an act of hostility, forms an exact parallel in its mode of commencement to many of the wars of last century. The war of 1870, which was commenced by a declaration handed to Count Bismarck by the French chargé d'affaires, and that in 1877 between Russia and Turkey, which was declared by a formal despatch handed to the Turkish chargé d'affaires at St. Petersburg, afford instances of direct notice. In most, if not all, other cases, hostilities have been preceded by manifestos. [President Kruger, it will be remembered, issued an ultimatum to the British Government on

Recent practice.

[1] Hautefeuille, tit. iii, ch. i. sect. 2; Heffter, § 120; Calvo, § 1663; but see also § 1649; Riquelme, i. 131-3; Bluntschli, §§ 521-2; Wheaton, pt. iv. ch. i. § 6; Klüber, §§ 238-9; Twiss, ii. §§ 35-7; Phillimore, iii. ch. v. In Holtzendorff's Handbuch (1889, vol. iv. §§ 82-4) neither declaration nor manifesto is held to be necessary though a belligerent ought, it is said, to give notice of some sort if he can do so consistently with his political interest and his military aims. F. de Martens (Traité de Droit Int. iii. 205) considers that neither proclamation nor diplomatic notice are obligatory, provided that the state of relations is such that hostilities will not be a surprise. Hostilities which constitute a surprise he characterises as brigandage and piracy. As instances of such attacks he mentions the invasion of Silesia in 1740, and the commencement of war by the United States in 1812 before the vote of Congress was known in England. Geffcken (1888, notes to Heffter, § 120) regards a notice fixing a date, from which hostilities shall be considered to begin, to be necessary in the interests of neutrals and of the subjects of the belligerent states. To this view, so far as neutrals and the subjects of the state commencing hostilities are concerned, no objection can be taken; but if there is no duty towards the enemy state, there can be no duty towards its subjects. Probably M. Geffcken is influenced by the consideration that enemy subjects ought not to be exposed without warning to danger of life, and to the manifold risks and horrors of war upon land. This is so; but for reasons which have nothing to do with the illusory safeguard of a manifesto.

PART III CHAP. I Oct. 9, 1899, demanding, *inter alia*, that all British troops should be withdrawn from the borders of the Republic and all reinforcements stopped; default of a satisfactory answer within forty-eight hours would be regarded as a formal declaration of war. On the expiration of this period the Transvaal forces crossed the frontier, and the President of the Orange Free State at the same time declared war on Great Britain in a manifesto addressed to his Burghers.]

Conclusions. Looking at the foregoing facts as a whole it is evident that it is not necessary to adopt the artificial doctrine that notice must be given to an enemy before entering upon war. The doctrine was never so consistently acted upon as to render obedience to it at any time obligatory. Since the middle of last century it has had no sensible influence upon practice. In its bare form it meets now with little support, compared with that which it formerly received. In the form of an assertion that a manifesto must be published it is so enfeebled as to be meaningless. To regard a manifesto as the equivalent of a declaration is to be satisfied with a fiction, unless it be understood that hostilities are not to commence until after there is a reasonable certainty that authenticated information of its contents has reached the enemy government. The use of a declaration does not exclude surprise, but it at least provides that notice shall be served an infinitesimal space of time before a blow is struck. A manifesto, apart from the reservation mentioned, is quite consistent with a blow before notice. The truth is that no forms give security against disloyal conduct, and that when no disloyalty occurs states always sufficiently well know when they stand on the brink of war. Partly for the convenience of the subjects of the state, and partly as a matter of duty towards neutrals[1], a manifesto or an equivalent notice ought always to be issued, when possible, before the commencement of hostilities; but to imagine a duty of giving notice to an enemy is both to think incorrectly and to keep open a door for recrimination in cases, which may sometimes arise, when action, for example on conditional orders

[1] See postea, p. 574.

to a general or admiral, takes place in such circumstances that a manifesto cannot be previously published.

If the above views are correct, the moment at which war begins is fixed, as between belligerents, by direct notice given by one to the other, when such notice is given before any acts of hostility are done, and when notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative.

Negative effects of the commencement of war.

The outbreak of war, besides calling into existence the rights which will be discussed in the following chapters, has the negative effect of—

1. Abrogating and suspending treaties of certain kinds.

2. Putting an end to all non-hostile relations between subjects of the belligerent states.

Abrogation and suspension of treaties. Opinions of writers.

It is not altogether settled what treaties are annulled or suspended by war, and what treaties remain in force during its continuance or revive at its conclusion. According to some writers all treaties are annulled, except in so far as they are concluded with the express object of regulating the conduct of the parties while hostilities last[1]. Wheaton considers that so-called 'transitory conventions,' which set up a permanent state of things by an act done once for all, such as treaties of cession or boundary, or those which create a servitude in favour of one nation within the territory of another, generally subsist notwithstanding the existence of war, 'and although their operation may in some cases,' which he does not specify, 'be suspended during war, they revive on the return of peace without any express stipulation;' other treaties, as of commerce and navigation, expire of course, except 'such stipulations as are made expressly with a view to a rupture[2].' De Martens is of the same opinion, except that he thinks that transitory conventions may always be suspended and sometimes annulled[3]. Other writers, and the English and American courts, hold that 'transitory conventions'

[1] Vattel, liv. iii. ch. x. § 175; Riquelme, i. 171.

[2] Elem. pt. iii. ch. ii. §§ 9, 10.

[3] Précis, § 58.

are in no case destroyed or suspended by war, they being, according to Sir Travers Twiss, less of the nature of an agreement than of a recognition of a right already existing, or, as the same view was put in the form of an example by an American judge, if treaties which 'contemplate a permanent arrangement of territorial or other national rights were extinguished by the event of war, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone,' and on the occurrence of war between England and the United States 'we should have had again to struggle for both upon original revolutionary principles[1].' Others again think that all treaties remain binding unless their terms imply the existence of peace, or unless the reason for their stipulations is destroyed by the war; or else that treaties of the last-mentioned kind, such as treaties of alliance, are annulled, but that treaties of commerce, postal conventions, and other arrangements of like character, are suspended only, and that treaties or provisions in them, such as those ceding or defining territory, which are intended to be permanent, remain in force; or finally that treaties are put an end to or suspended only when or in so far as their execution is incompatible with the war itself[2].

Recent practice.

A like divergence of opinion is suggested by the conduct of states at the conclusion of recent wars. By the Treaty of Paris, which ended the Crimean War, it was stipulated that until the treaties or conventions existing before the war between the belligerent powers were renewed or replaced by fresh agreements, trade should be carried on on the footing of the regulations in force before the war, and the subjects of the inter-belligerent states should be treated as between those states as favourably as those

[1] Twiss, i. §§ 225–6; Sutton *v.* Sutton, i. Russell and Mylne, 663; The Society for the Propagation of the Gospel in Foreign Parts *v.* The Town of Newhaven, viii Wheaton, 494. Sir R. Phillimore (pt. xii. ch. ii) seems to consider that treaties which 'recognise a principle and object of permanent policy' remain in operation, and that those which relate 'to objects of passing and temporary expediency' are annulled; but he does not very clearly indicate the boundaries of the two classes.

[2] Heffter, §§ 122 and 180–1; Calvo, § 1687; Bluntschli, § 538.

of the most favoured nation. Under this provision, not only were fresh treaties of commerce concluded, but it seemed necessary to Russia and Sardinia to exchange declarations to the effect that a convention for the abolition of the droit d'aubaine, than which no agreement could seem to be more thoroughly made in view of a permanent arrangement of rights, was to be considered as having recovered its force from the date of the exchange of ratifications of the treaty. Again, as between Austria and Sardinia in 1859, all treaties in vigour upon the commencement of the war of that year were confirmed, that is to say were stated by way of precaution to be in force, by the Treaty of Zurich, and among those treaties seem to have been a treaty of commerce and a postal convention; but as between Austria and France no revival or confirmation of treaties was stipulated although agreements of every kind existed between them. In 1866 the Treaty of Vienna between Austria and Italy confirmed afresh the engagements with which the Treaty of Zurich had dealt, and the Treaty of Prague revived, or in other words restipulated, all the treaties existing between Prussia and Austria in so far as they had not lost their applicability through the dissolution of the German Confederation. In 1871 the Treaty of Frankfort revived treaties of commerce and navigation, a railway convention having reference to the customs, copyright conventions and extradition treaties, without making any mention of other treaties by which France and Germany were bound to each other.

Classification of treaties with reference to war.

Looking at the matter apart from authority and from practice, treaties and other conventions, except those made in express contemplation of war, or articles so made forming part of more general treaties, as to the binding force of which during hostilities there is no question, would seem to fall naturally for present purposes under the following heads:—

1. Treaties, such as great European territorial settlements and dynastic arrangements, intended to set up a permanent state of things by an act done once for all, in which the belligerent parties have contracted with third powers as well as with each other.

2. Treaties also binding the belligerent states with third powers as well as to each other, but unlike the former class stipulating for continuous acts or for acts to be done in certain contingencies, such for example as treaties of guarantee.

3. Treaties with political objects, intended to set up a permanent state of things by an act done once for all, which have been concluded between the belligerent parties alone, such as treaties of cession or of confederation.

4. Treaties concluded between the belligerent states only, and dealing with matters connected with the social relations of states, which from the nature of their contents appear to be intended to set up a permanent state of things, such as conventions to abolish the droit d'aubaine or regulate the acquisition and loss of nationality.

5. Treaties concluded between the belligerent states only, whether with political objects or not, which from the nature of their contents do not appear to be intended to set up a permanent state of things, such as treaties of alliance, commercial treaties, postal conventions, &c.

Conclusions.

With regard to the first of these classes of treaties it is obvious that the fact of war makes no difference in their binding force, since each party remains bound to another with whom he is not at war. There is also no difficulty in observing them, since they merely oblige to an abstention from acts at variance with their provisions. The second class remain equally obligatory, subject to the condition that there shall be a reasonable possibility of carrying out their provisions; but as those provisions require performance of acts, and not simply abstention from them, compliance may readily be inconsistent with the state of war or with the incidents of the particular war. Treaties of this kind therefore must be viewed according to circumstances, as continuing or as being suspended. Compacts of the third kind, on the other hand, must in all cases be regarded as continuing to impose obligations until they are either supplanted by a fresh agreement or are invalidated by

a sufficiently long adverse prescription. Suppose, for example, that a province belonging to one of two states is held under a treaty of cession from the other. On the outbreak of war between them, if the treaty were annulled by the occurrence of hostilities, the former owner would re-enter the province as his own, or if it were suspended he would be able to exercise the rights of a sovereign there as against those of an occupant in the remainder of his enemy's territory. Neither of these things however takes place. The rights of a belligerent in territory which he has formerly ceded are identical with those which he has in territory which has never belonged to him. In both he has merely the rights of a military occupant; he may appropriate both; but neither become definitively his until the conclusion of a peace assigning the territory to him, or, if his enemy refuses to treat, until a due term of prescription has elapsed. As regards treaties of the fourth class, it would seem reasonable that they should continue or be suspended at the will of either of the belligerents. They are intended to be permanent arrangements so long as peace shall exist, and there is nothing in the fact of war to prevent them from recommencing their operation automatically with the conclusion of peace; there is therefore no reason for supposing them to be annulled. But as all social relations are suspended for the time of war except by express or tacit permission of the sovereign, it is impossible to look upon treaty modifications of the normal social relations which are thus interrupted as being compulsorily operative during the progress of hostilities; except that the effects of acts previously done under their sanction must remain unaltered. Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be all

annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace.

In all cases in which war is caused by differences as to the meaning of a treaty, the treaty must be taken to be annulled. During hostilities the right interpretation is at issue; and it would be pedantry to press the analogy between war and legal process so far as to regard the meaning ultimately sanctioned by victory as representing the continuing obligation of the original compact. Whether the point in dispute be settled at the peace by express stipulations, or whether the events of the war have been such as to render express stipulations unnecessary, a fresh starting-point is taken; a peace which, whether tacitly or in terms, gives effect to either of two interpretations has substituted certainty for doubt, and thus has brought a new state of things into existence.

Termination of non-hostile relations between subjects of the enemy states, and between the government of the one and the subjects of the other.

To say that war puts an end to all non-hostile relations between the subjects of enemy states, and between the subjects of one and the government of the other, is only to mention one of the modes of operation of the principle, which lies at the root of the laws of war, that the subjects of enemy states are enemies. The rule is thus one which must hold in strict law in so far as no exception has been established by usage. Logically it implies the cessation of existing intercourse, and therefore a right on the part of a state to expel or otherwise treat as enemies the subjects of an enemy state found within its territory; the suspension or extinction of existing contracts according to their nature, among extinguished contracts being partnerships, since it is impossible for partners to take up their joint business on the conclusion of war at precisely the point where it was abandoned at its commencement; a disability on the part of the subjects of a belligerent to sue or be sued in the courts of the other [or to be naturalised in the state with which their country is at war] [1]; and finally, a prohibition of fresh trading or other

[1] Rex v. Lynch, L. R. 1903, 1 K. B. 444.

intercourse and of every species of private contract[1]. Of late years it is seldom that a state has exposed itself, together with its enemy, to the inconveniences flowing from a rigid maintenance of the rule of law; but the mitigations of it which have taken place have generally been either too distinctly dictated by the self-interests of the moment alone, or have been too little supported by usage, to constitute established exceptions[2]. Probably the only application of the rule, a relaxation of which has acquired international authority, is that which has to do with the treatment of enemy subjects who happen to be in a belligerent country at the outbreak of war.

Exceptional usage with respect to enemy subjects

Bynkershoek in speaking of the right of a belligerent state to treat as prisoners enemy subjects found within its boundaries at the beginning of war, mentions that the right had seldom been exercised in recent times, and gives a list of treaties, which might

[1] Contracts arising out of the state of war, and permitted under the customs of war;—as ransom bills (see postea, p. 460), are exceptions. They can be made and enforced during the continuance of war.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. c. iii; The Hoop, i Rob. 196; The Rapid, viii Cranch, 160–2; Mr. Justice Story in Brown v. the United States, ib. 136; Wheaton, Elem. pt. iv. ch. i. §§ 13, 15; Twiss, ii. §§ 46–57; Phillimore, pt. ix. ch. vi. De Martens (Précis, § 269) thinks that the outbreak of war does not produce the above effects of itself, but that a state may if it chooses issue 'letters inhibitory' of all intercourse with the enemy. Heffter (§ 123) is of the same opinion. Bluntschli (§ 674) says only that 'tous rapports entre les contrées occupées par les armées ennemies sont dans la règle interdits;' thus suggesting that only personal intercourse within the area of military operations is forbidden; he at least argues, on the strength of his doctrine that the subjects of enemy states are not enemies, that this ought to be the case. Calvo (§§ 1682–6) admits the rule of law to be that all relations between the subjects of states at war with one another become interdicted by the fact of war, but regards the rule as out of date and of unjustifiable rigour. Dr. Lueder in Holtzendorff's Handbuch (1889, iv. § 87) follows Heffter, because 'die Handelsfreiheit ist das Ursprüngliche, die Regel und das naturgemäss den einzelnen Menschen Zukommende.' His opinion might have more weight if he had not given his reason for it. Geffcken (1888, notes to Heffter, § 123) agrees fully with the statement of law given in the text, and holds that any relaxations given must be expressly granted.

For the revival of the right at the end of a war to enforce contracts made before its outbreak, and therefore suspended during its continuance, see Ex parte Bousmaker, xiii Vesey, 71, and Wheaton, Elem. pt. iv. ch. i. § 12.

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in a belligerent state at the outbreak of war.

easily be enlarged, stipulating for the reservation of a specified time during which the subjects of the contracting parties should be allowed to withdraw themselves and their property from the respective countries in the event of war between them [1]. By the early part of the eighteenth century therefore a usage was in course of growth, under which enemy subjects were secured the opportunity of leaving in safety, and though the custom did not establish itself so firmly as to dispense altogether with the support of treaties, those which were made in the end of that century, and which have been made since then, may rather be looked upon

[1] Quaest. Jur. Pub. lib. i. c. iii. Vattel (liv. iii. ch. iv. § 63) says that 'le souverain qui déclare la guerre ne peut retenir les sujets de l'ennemi qui se trouvent dans ses états au moment de la déclaration. Ils sont venus chez lui sur la foi publique: en leur permettant d'entrer dans ses terres et d'y séjourner, il leur a promis tacitement toute liberté et toute sûreté pour le retour. Il doit donc leur marquer un temps convenable pour se retirer avec leurs effets; et s'ils restent au delà du terme prescrit, il est en droit de les traiter en ennemis, toutefois en ennemis désarmés.' Moser, on the other hand, could still write in 1779 that 'wann keine Verträge deswegen vorhanden seynd, ist es dem Europäischen Völkerrecht nicht entgegen, wann ein Souverain die in seinem Lande befindliche feindliche Unterthanen arrestirt' (Versuch, ix. i. 49).

In the infancy of international law the harsher of these two doctrines, as might be expected, existed alone. Ayala says, 'Est quoque notatu dignum quod inter duos populos bello exorto, qui ex hostibus apud utrumque populum fuerint, capi possint, licet in pace venerint; nam et olim servi efficiebantur' (De Jure et Off. Bell. lib. i. cap. v. § 25). And Grotius writes, 'Ad minuendas hostium vires retineri eos (i. e. enemy subjects within the country of a belligerent) manente bello non iniquum videbatur; bello autem composito nihil obtendi poterat, quominus dimitterentur. Itaque consensum in hoc est; ut tales in pace semper libertatem obtinerent, ut confessione partium innocentes' (De Jure Belli et Pacis, lib. iii. c. ix. § 4).

During the middle ages nevertheless it seems to have been a pretty general practice not to detain enemy subjects, and to give them when expelled sufficient warning to enable them to carry off or to sell their property. When Louis IX arrested the English merchants within his kingdom on the commencement of war in 1242 Matthew Paris stigmatises his conduct as 'laedens enormiter in hoc facto antiquam Galliae dignitatem;' by the Statute of Staples, 27 Ed. III, it was provided that on war breaking out foreign merchants should have forty days in which to depart the realm with their goods; an Ordinance of Charles V shortly afterwards gave a like indulgence in France; and in 1483 a treaty was concluded between France and the Hanse Towns under which merchants of the Hanse Confederation were to be [illegible] liberty to remain in the French dominions for one year after war broke [illegible] Twiss, ii. § 49.

as intended to secure a reasonable length of time for withdrawal and for the settlement of private affairs than to guard against detention[1]. The solitary modern instance of detention, which is presented by the arrest of the English in France in 1803, is only excused by writers whose carelessness has allowed them to rest content with the French assertion that the act was a measure of reprisal[2]. There can be no doubt that a right of detention no longer exists, except when persons have wilfully overstayed a period granted to them for withdrawal, and in the case of persons whose conduct or the magnitude of whose importance to their state afford reasons for special treatment; perhaps also in the case of persons belonging to the armed forces of their country.

Custom of allowing enemy subjects to remain in a country during good behaviour.

It is a more real question whether, or to what extent, a usage of permitting enemy subjects to remain in a country during good behaviour is becoming authoritative. The origin of the practice is not remote. It may fairly be inferred from the manner in which Vattel mentions the permission to remain which was given by the English government at the opening of the war of 1756 to French persons then in the country, that the instance was the only one with which he was acquainted[3]. When a custom began to form it is difficult to say, because residence was no doubt often tacitly allowed where evidence of permission is wanting; but in recent wars express permission has always been given, and the sentiment of the impropriety of expulsion has of late become so strong that when in 1870 the government of the National Defence in France so far rescinded the permission to remain which was accorded to enemy subjects at the beginning of the war as to expel them from the department of the Seine, and to require them either to leave France or to retire to the south of

[1] The period provided in the numerous treaties which have been concluded with this object during the last century and a half ranges from six months to a year. They will be found in the collections of De Martens; the earliest in date is that between England and Russia in 1766 (Recueil, i. 396).

[2] [For a very half-hearted attempt to justify the conduct of Bonaparte on this ground see the Mémoires du Chancelier Pasquier, i. 164.]

[3] Liv. iii. ch. iv. § 63. A like permission was given to Spanish subjects in England in 1762. Twiss, ii. 89.

the Loire, it appeared to be generally thought that the measure was a harsh one[1]. It is scarcely probable that the feeling which showed itself would have been entertained unless public opinion was not only moving in advance of the notion that persons happening to be in a country at the outbreak of war between it and their own state ought to have some time for withdrawal, but was already ripe for the establishment of a distinct rule allowing such persons to remain during good behaviour. In the particular case some injustice was done to the French government. The fear that danger would arise from the presence of Germans in Paris may have been utterly unreasonable; but their expulsion was at least a measure of exceptional military precau-

[1] For the French permission of the 20th July, and the order of Gen. Trochu of the 28th of August, see D'Angeberg, Nos. 194 and 367.

The writers by whom the subject is mentioned still generally hold to the doctrine that a reasonable space of time for leaving the country is all that can be asked for. Heffter says (§ 126) that 'les sujets ennemis qui, lors de l'ouverture des hostilités, se trouvent sur le territoire de l'une des puissances belligérantes ou qui y sont entrés dans le cours de la guerre, devront obtenir un délai convenable pour le quitter. Les circonstances néanmoins peuvent aussi rendre nécessaire leur séquestration provisoire, pour les empêcher de faire des communications et de porter des nouvelles ou des armes à l'ennemi.' Twiss (ii. §§ 47–8, 50) seems to think that where a commercial domicil has been acquired by a foreigner a sort of tacit contract may be presumed between him and the state that he will be allowed to live under its protection so long as he obeys its laws; but that in 'strict right' he may nevertheless be expelled on the outbreak of war, and that foreigners *in transitu* have no shadow of a claim to be allowed to stay. Calvo (§ 1712) does not appear to regard even the right of withdrawal to be wholly assured where no treaty stipulations exist. Riquelme (i. 135) mentions the practice of allowing enemy subjects to continue to reside, but considers that international law only prescribes that they shall be allowed to leave the country. F. de Martens (1887, iii. 200) regards permission to remain as a settled usage.

There are a certain number of treaties in which the right of residence during good behaviour is stipulated for. In the treaty between England and the United States in 1795 it was stipulated that merchants and other enemy subjects 'shall have the privilege of remaining or continuing their trade, so long as they behave peaceably and commit no offence against the laws; and in case their conduct should render them suspected and the respective governments should think proper to order them to remove, the term of twelve months from the publication of the order shall be allowed them for that purpose' (De Martens, Rec. v. 684). The term allowed for removal varies considerably in the different treaties; in the treaty of 1886 between France and Mexico it is merely 'un délai suffisant.'

tion. The conduct of the government may have been foolish, but it was not wrong. Any right of staying in a country during good behaviour, which may be acquired by enemy subjects, must always be subordinate to considerations of military necessity; and whatever progress may have been made in the direction of acquiring the right itself, there can be no doubt that it is not yet firmly established.

When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.

CHAPTER II

RIGHTS WITH RESPECT TO THE PERSON OF ENEMIES

PART III
CHAP. II

Limits to the right of violence against the person of enemies.

Belligerent rights with respect to the person of an enemy, in their actual form, represent the general right of violence over the person of all the inhabitants of a hostile country which an enemy formerly considered himself to possess, as modified by the mitigating principle, which has gradually succeeded in establishing a superior authority, that the measure of permissible violence is furnished by the reasonable necessities of war[1].

These reasonable necessities are marked out in a broad way by the immediate objects at which a belligerent aims in attacking the person of his enemy. He endeavours to break down armed resistance, because upon the ability of his enemy to offer it depends the power of the latter to reject the terms to which it is sought to bring him. A belligerent consequently kills his armed enemies so far as is needed to overcome the national resistance, and makes prisoners of them and of persons by whom the action of the enemy state is directed. But the attainment

The Hague Conference.

[1] [Since the last edition of this book the International Peace Conference held at the Hague during May, June and July, 1899, has dealt with many of the subjects treated in this and the following chapters. While the Conference failed signally to attain the object for which it was originally convened by the Czar—the limitation and diminution by common consent of international armaments on land and sea—its labours in other directions were crowned by considerable success. In addition to the establishment of a Permanent Court of International Arbitration two conventions were concluded dealing with the laws and customs of war by land, and adapting to maritime warfare the principles of the Geneva Convention of 1864. The majority of the Powers assembled also agreed upon three declarations prohibiting the use in warfare of projectiles the only object of which is the diffusion of asphyxiating gases, and of bullets which expand or flatten easily in the human body, and forbidding projectiles and explosives to be launched from balloons. These declarations were left unexecuted by the representatives of Great Britain as well as by those of the United States.]

of this immediate object of crushing the armed force opposed to him is not helped by the slaughter or ill-usage of persons who either are unable to take part in hostilities, or as a matter of fact abstain from engaging in them; and although the adoption of such measures might tend, by intimidating the enemy, to persuade him to submit, their effect is looked upon with reason as being too little certain or immediate to justify their employment[1]. Hence the body of persons who are enemies in law split themselves in the main into two classes;—non-combatants, whom a belligerent is not allowed to ill-use or to kill intentionally, except as a punishment for certain acts, which though not done with the armed hand, are essentially hostile[2]; and combatants, whom in permitted places it is allowable to capture at all times, and under certain conditions to kill[3].

Non-combatants.

Of the non-combatant class little need be said. It only re-

[1] The principle that innocuous persons ought not to be killed was asserted in the Canon De Treuga (Decretal. Greg. lib. i. tit. xxxiv. cap. 2), and Franciscus à Victoria declares explicitly that 'nunquam licet per se et ex intentione interficere innocentem. Fundamentum justi belli est injuria; sed injuria non est ab innocente: ergo non licet bello uti contra illum.' Hence 'sequitur quod etiam in bello contra Turcos non licet interficere infantes. Imo nec foeminas inter infideles, . . . imo idem videtur judicium de innoxiis agricolis apud Christianos, imo de alia gente togata et pacifica, quia omnes praesumuntur innocentes nisi contrarium constaret.' (Relect. Theol. vi.) But these utterances of a doctrine of mercy were far in advance of the habits of the time; and their repetition by Grotius was contemporary with the horrors of the Thirty Years' War (lib. iii. cap. xi. §§ 8–12). From that period however opinion changed rapidly. The conduct of the French armies in the Palatinate and the Low Countries, and the Proclamation of Louis XIV to the Dutch, in which he announced that 'lorsque les glaces ouvriront le passage de tous côtés, sa Majesté ne donnera aucun quartier aux habitants des villes' (Dumont, Mém. Politiques pour servir à la parfaite Intelligence de la Paix de Ryswick, ii. 66), were reprobated throughout Europe; Pufendorf (bk. viii. c. vi. § 7) in echoing the doctrine of Grotius, spoke to a world which was already convinced; and Bynkershoek (Quaest. Jur. Pub. lib. i. cap. i) stands alone in the eighteenth century in giving to a belligerent unlimited right of violence.

[2] For these acts see postea, pp. 471–2, 539.

[3] On the whole subject of rights with respect to the person of enemies see the Manuel des Lois de la Guerre sur Terre, drawn up by a Committee of the Institut de Droit International, and published by the Institut (Brussels, 1880).

PART III CHAP. II quires to be pointed out that the immunity from violence to which they are entitled is limited by an important qualification, which is no doubt in part necessary to the prosecution of military and naval operations, but the extent of which is only to be accounted for by remembering that if the principle that the measure of permissible violence is furnished by the reasonable necessities of war is theoretically absolute, the determination of reasonable necessity in practice lies so much in the hands of belligerents that necessity becomes not infrequently indistinguishable from convenience. The qualification in question is that though non-combatants are protected from direct injury, they are exposed to all the personal injuries indirectly resulting from military or naval operations directed against the armed forces of the state, whether the mode in which such operations are carried out be reasonably necessary or not. So far as death or injury may be caused by such acts as firing upon a ship carrying passengers, or an attack upon the train of an army, in the course of which for example chaplains or surgeons might be killed without deliberate purpose, there is no reason to complain of the effect of the qualification. But the bombardment of a town in the course of a siege, to take an example on the other side, when in strict necessity operations need only be directed against the works, and when therefore bombardment really amounts to an attempt to obtain an earlier surrender than would be militarily necessary, through the pressure of misery inflicted on the inhabitants, is an act which, though permissible by custom, is a glaring violation of the principle by which custom professes to be governed.

Combatants. The right to kill and wound armed enemies is subordinated to the condition that those enemies shall be able and willing to continue their resistance. It is unnecessary to kill men who are incapacitated by wounds from doing harm, or who are ready to surrender as prisoners. A belligerent therefore may only kill those enemies whom he is permitted to attack while a combat is actually in progress; he may not as a general rule refuse

quarter; and he cannot mutilate or maim those who fall into his power[1].

Duty of giving quarter.

The general duty to give quarter does not protect an enemy who has personally violated the laws of war, who has declared his intention of refusing to grant quarter or of violating those laws in any grave manner, or whose government or commander has done acts which justify reprisals[2]. It may be doubted however whether the right of punishment which is thus placed in the hands of a belligerent has been used within the present century in any strictly international war, and though its existence may be a wholesome check to the savage instincts of human nature which now and then break through the crust of civilised habit, it is certain that it ought only to be sparingly exercised after great and continuous provocation, and that any belligerent who availed himself of his power would be judged with extreme severity. [Article 23 of the Hague Convention on the Laws and the Customs of War expressly forbids a belligerent to declare that no quarter will be given.]

Possible exception.

An exception to the rule that quarter cannot be refused is also supposed to arise when from special circumstances it is impossible for a force to be encumbered with prisoners without danger to itself[3]. Instances of such impossibility have not presented themselves in modern warfare. Prisoners who cannot safely be kept can be liberated, and the evil of increasing the strength of the enemy is less than that of violating the dictates

[1] Vattel, liv. iii. ch. viii. § 140; De Martens, Précis, § 272; American Instructions for Armies in the Field, Art. 60; Bluntschli, § 580; Art. 13 of the Project of Declaration on the Laws and Usages of War, adopted by the Conference of Brussels in 1874 as a basis of negotiation with a view to a general agreement upon the subject of the practices of war. De Martens, Nouv. Rec. Gén. 2e Sér. iv. 1.

'Qui merci prie, merci doit avoir' was already a maxim in the fourteenth century, but in the beginning of the seventeenth century prisoners might in strict law be still slaughtered, though to do so was looked upon as 'mauvaise guerre.'

[2] De Martens, Précis, § 272; American Instruct., Art. 63.

[3] Vattel, liv. iii. ch. viii. § 151; De Martens, Précis, § 272; American Instruct., Art. 60; Bluntschli, § 580.

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of humanity, unless there is reason to expect that the prisoners if liberated, or a force successfully attempting rescue, would massacre or ill-treat the captors. Subject to the condition that there shall be reasonable ground for such expectation it may be admitted that cases might occur in which the right could be legitimately exercised, both at sea and in campaigns resembling those of the Indian Mutiny, when small bodies of troops remained for a long time isolated in the midst of enemies[1].

[1] Formerly quarter was not given to the garrison of a place which resisted an attack from an overwhelming force, which held out against artillery in the absence of sufficient fortifications, or which compelled the besiegers to deliver an assault. In 1543, for example, the French took 'Sainct Bony' in Piedmont by storm, 'et furent tous ceux de dedans tuez, hors mis le capitaine, qui fu pendu, pour avoir ésté si oultrageux de vouloir tenir une si meschante place devant le canon' (Mém. de Martin du Bellay, liv. ix). It might have been hoped that such a usage would now only rank among the curiosities of history. But Vattel (liv. iii. chap. viii. § 143) thinks it necessary to argue at length against executing a commandant; M. Heffter (§ 128) expresses the hope that such an execution will never occur again; M. Calvo (§ 856) treats as a still existing opinion the view that the garrison of a weak place may be massacred for resistance; Gen. Halleck (ii. 90), while condemning the practice as contrary to humanity, seems to state it as a living usage; and the Duke of Wellington, though he never acted in conformity with it, wrote in 1820 that 'I believe it has always been understood that the defenders of a fortress stormed have no right to quarter; and the practice, which has prevailed during the last century, of surrendering a fortress when a breach was opened in the body of the place and the counterscarp was blown in, was founded upon this understanding' (Despatches, 2nd Series, i. 93); finally, the Russian government thought it worth while in the original sketch of a convention respecting the laws of war to enumerate among forbidden acts 'la menace d'extermination envers une garnison qui défend obstinément une forteresse.'

In spite of this accumulated evidence that up to a late period the usages of war allowed a garrison to be massacred for doing their duty to their country, there can be no hesitation in excluding the practice from the list of those which are now permitted. It is wholly opposed to the spirit of the general body of the laws of war, and it therefore can only pretend to rank as an exceptional usage. But for an exceptional usage to possess validity in opposition to general principles of law it must be able to point to a continued practical recognition, which the usage in question is unable to show.

There is probably no modern instance of the indiscriminate slaughter of a garrison, except that of the massacre of the garrison and people of Ismail by the Russians in 1790, and if one instance were now to occur, the present temper of the civilised world would render a second impossible. [Since these words were written (in 1880) an even more hideous massacre

In the case of enemies rendered harmless by wounds or disease, the growth of humane feeling has long passed beyond the simple requirements that they shall not be killed or ill-used, and has cast upon belligerents the duty of tending them so far as is consistent with the primary duty to their own wounded. But the care which the wounded of a defeated army thus obtain is necessarily inadequate to their wants, and the usefulness of surgeons on both sides is hampered by their liability to be detained as prisoners. A step, of which the value in mitigating the unnecessary horrors of war cannot be over-estimated, would therefore be made if a general, and sufficiently full, understanding were arrived at as to the treatment of sick and wounded, and of persons and things engaged in their service, which should give free scope, so far as the exigencies of war permit, to the action of every one whom duty or charity may enlist in the mitigation of suffering. Under the Convention of Geneva of 1864, the greater part of the European states bound themselves to observe a code framed with this object, and the accession of nearly all the civilised states of the world has converted its provisions into rules of overwhelming authority. The states which have not yet signified their adhesion are indeed of such slight importance that the contents of the Convention may fairly be regarded as forming a portion

Treatment of sick and wounded.

The Geneva Conventions.

than that of Ismail has been perpetrated. On November 21, 1894, the Japanese army stormed Port Arthur and for five days indulged in the promiscuous slaughter of non-combatants, men, women, and children, with every circumstance of barbarity. The only excuse alleged was that officers and soldiers alike were roused to uncontrollable fury by the sight of the mutilated remains of comrades who had fallen into the hands of the Chinese and been tortured to death (*Times*, Jan. 8, 1895). Though an enquiry was ordered by the Japanese military authorities, no satisfactory explanation or reparation was ever tendered, but the scrupulous anxiety shown by Japan on every other occasion throughout the war to conduct its operation in harmony with the laws of humanity has been accepted in condonation of a solitary though deplorable lapse into savagery. Of the frightful atrocities committed by some of the European contingents on the defenceless Chinese population during the advance upon Pekin in August 1900, and in the subsequent operations, there is unhappily no room for doubt; and the slaughter by the Russians of the whole Chinese population of Blagovestchensk recalls the worst horrors of the Thirty Years' War.]

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of authoritative international law [1]. The provisions, however, which were agreed upon by no means exhausted the matters which needed regulation, or sufficiently dealt with those which were touched, and a conference was held at Geneva in 1868 with the object of framing a supplementary Convention. Further rules were drafted by the plenipotentiaries of the states represented, but while they were accepted in principle, they failed to secure ratification, and they remain without binding force, though the provisional agreement which was arrived at with regard to them lends no inconsiderable weight in a general sense to their prescriptions. [Article 21 of the Hague Convention for regulating the laws of land warfare, while re-enacting the Geneva Convention of 1864, is silent as to the supplementary Convention; but in many respects the stipulations of the latter are given effect to in the various formal Acts of the Hague Conference.] [2]

Under the Geneva Conventions wounded and sick soldiers must be collected and tended; while in field or military hospitals, in hospital ships, or in course of being transferred from one hospital to another, wounded or sick men belonging to land or sea forces are regarded as neutrals; and if on recovery while in the hands of the enemy it appears that they are unfit for military service they must be sent back to their country. By an article of the

[1] The states which acceded to the Convention in the first instance, and which are still independent, were Switzerland, France, Belgium, Denmark, Italy, Spain, the Netherlands, Greece, Great Britain, Prussia, Sweden, Austria, Russia, and Turkey. The names are arranged in the order of time in which ratification was given. Since then Roumania (1874), Persia, San Salvador, Montenegro, Servia, Bolivia, Chile, the Argentine Confederation, Peru, Nicaragua, the United States (1882), Bulgaria (1884), and Japan (1886), have notified their adhesion. Thus the only states which have not yet adopted the Convention are Portugal, Brazil, Mexico, Colombia, Costa Rica, Uruguay and Venezuela. [But Art. 21 of the Hague Convention for regulating the laws of land warfare expressly imposed the Geneva Convention of 1864 on all its signataries, amongst whom are numbered Portugal and Mexico.]

[2] A very full account of the Geneva Convention will be found in Holtzendorff's Handbuch (1889, iv. §§ 76–9). For the text of the two Conventions [and for those of the Hague] see Parl. Papers. [See also for the latter De Martens, Nouv. Rec. Gén., 2e Sér. xxvi. 958.]

supplementary Convention which probably demands more from a belligerent than a just regard for his own interests will allow him to perform, ability to serve was not to prevent the restoration of convalescents on parole, except in the case of superior officers. Surgeons and other persons engaged in attendance on the sick and wounded or in their transport, whether they are volunteers or in the service of the enemy, are neutralised during such time as they are actually employed; so long as there are any sick or wounded to succour, they may remain in any hospital to which they may be attached, and so long as they stay with it they must continue to fulfil their duties; but they may also in the exercise of their own discretion rejoin the corps or return to the country to which they belong, the enemy having only the right to detain them for such time as may be required by strict military necessities. Field and military hospitals are also neutralised so long as any sick or wounded are in them: but while ambulances with their horses and medical and surgical stores are in no case liable to seizure, and accompany their staff when the latter rejoin the enemy, in fixed hospitals the stores are appropriated by the captors, and the medical staff in leaving only carry with them their private property. The special conditions of naval war call for provisions applicable to it alone, and an attempt was made to supply them by the Conference of 1868. Trading vessels containing sick and wounded passengers exclusively, and not laden either with enemy's goods or with contraband of war, were not to be seized; but the fact of a visit notified in the log-book by an enemy's cruiser, by establishing ability to capture, rendered the sick and wounded incapable of serving during the continuance of the war. Surgeons belonging to a captured vessel were bound to give their assistance until and during the removal of the wounded; so soon as this is effected they were free to return to their country. As hospital ships may be deprived of protection by accident of weather or position, and their capture is not therefore, as in the case of military hospitals, necessarily connected with the defeat of the force to which they belong,

they were not assimilated to fixed hospitals on land, but enjoyed a complete neutrality, if they had been officially designated as hospitals before the outbreak of war, and if they were unfit for warlike use; when these conditions were not satisfied they became the property of the captor, but he could not divert them from their special employment until after the conclusion of peace. Hospital ships fitted out by societies for the aid of sick and wounded, if provided with certain guarantees, were recognised as neutral, and permitted to operate under the reserve of a right of control and visit on the part of the belligerents. In order that neutralised objects and persons shall be recognised, hospitals were to be indicated by a special flag, hospital ships by a distinctive colour, and persons attendant on the sick and wounded by a badge. [These provisions were embodied in the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention signed at the Hague by the representatives of all the twenty-six powers there assembled, and they now form part of the recognised laws of war.]

There can be no doubt that the Geneva [and Hague] Conventions embody the principles on which the services giving aid to sick and wounded in war ought to be, and will be, regulated in the future, but the specific rules will probably undergo some change. In their present form they are open to criticism in many details, and the occurrences of 1870, besides suggesting that voluntary assistance may need to be brought under firmer control, betrayed at least one serious omission in the stipulations which have been accepted. The instances of disregard for the Convention, which appear to have been unfortunately numerous during the Franco-German War, may in part be explained by unavoidable accident, and in the main may probably be referred to an ignorance in the soldiery of the duties imposed upon them which it may be hoped has not been allowed to continue; but the possibility must always exist that acts will take place which cannot be so leniently judged, and until belligerents see proof that intentional violation of the Convention will be punished by their enemy, every violation will

be regarded as the evidence of a laxity of conduct on his part which will lead to corresponding laxity in them. In 1868 a proposal was made, and rejected by the European governments, that an article should be added to the Convention rendering infractions of it penal under their Articles of War. If the language of the article had covered wilful infractions only, its rejection would not have been to their credit[1]. [During the late South African War there were serious complaints, not confined to one side only, of the violation of the Geneva Convention. Strictly speaking, its provisions were not binding upon either of the combatants, since the Dutch Republics had not given adhesion to it and had not been represented at the Peace Conference at the Hague. It need hardly be said that no disposition to take advantage of this was manifested on the part of Great Britain, and the Boers, with rare exceptions, showed, in their treatment of the

[1] M. Bluntschli (§§ 587–9, 590–1–2) makes several criticisms on the details of the Convention and suggestions for its improvement. He notices with justice (§ 586) that the meaning of an expression in the 1st article is equivocal. It is stated that 'la neutralité cesserait si ces ambulances ou hôpitaux étaient gardés par une force militaire.' If the word 'gardés' is to be taken to signify 'militarily held,' no objection can be felt to the clause; but if it is to be read in the more natural sense of 'protected,' it sanctions a practice less liberal than that which has hitherto been customary. It is often necessary to place guards over hospitals to protect the inmates, or to prevent their contents from being plundered, and if on the appearance of the enemy these guards offer no resistance it has been usual to allow them to return to their army. The usage, and the duty of non-resistance correlative with the privilege, are illustrated by an occurrence which took place during the Peninsular War. Col. Trant on entering Coimbra, which was full of French sick and wounded, was resisted by the captain in command of the company left as a hospital guard. After sustaining an attack for three hours the captain requested to be allowed to rejoin the French army, and supported his demand when it was refused by referring to the case of an English company which had just before been sent in after the battle of Busaco. Colonel Trant required an unconditional surrender. 'You are not,' he said, 'in the same position as the English company. I have taken you with arms in your hands. You have killed or wounded thirty men and a superior officer; your resistance has been long and obstinate. You may think yourselves only too happy to be prisoners at all.' Koch, Mém. de Masséna, vii. 238. General Koch insinuates that the fact of resistance ought to have made no difference in the treatment accorded to the guard; but his judgment was apt to be warped when the conduct of English was in question.

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wounded and prisoners a desire to act in accordance with its spirit. It cannot be affirmed, however, that they were equally scrupulous in some other respects, and there were undoubtedly occasions on which the white flag and the Geneva badge were abused[1]. The enormously increased range of modern cannon and rifles tends to an ever-increasing difficulty in the location of field hospitals, and it cannot be expected that combatants will allow their operations to be impeded by the presence of an ambulance in the line of fire. Many of the so-called Ambulance Corps fitted out in neutral states were utilised as a cloak by volunteers from Europe and America desirous of joining the armies of the Republics, and in future wars it may be safely assumed that this form of international benevolence will be closely scrutinised by the belligerent powers.]

What persons may be made prisoners of war.

All persons whom a belligerent may kill become his prisoners of war on surrendering or being captured. But as the right to hold an enemy prisoner is a mild way of exercising the general rights of violence against his person, a belligerent has not come under an obligation to restrict its use within limits so narrow as those which confine the right to kill. He may capture all persons who are separated from the mass of non-combatants by their importance in the enemy's state, or by their usefulness to him in his war. Under the first of these heads fall the sovereign and the members of his family when non-combatants, the ministers and high officers of government, diplomatic agents, and any one who for special reasons may be of importance at a particular moment. Persons belonging to the auxiliary departments of an army, whether permanently or temporarily employed, such as commissariat employés, military police, guides, balloonists, messengers, and telegraphists, when not offering resistance on being attacked by mistake, or defending themselves personally during an attack

[1] For instance at Driefontein, on March 10, 1900, Lord Roberts reports from his own observation a 'flagrant breach of the recognised usages of war' in connexion with the white flag, and complains of the persistent use by the enemy of flat-nosed expanding bullets. Annual Register, 1900, p. 399.

made upon the combatant portions of the army, in which case they become prisoners of war as combatants, are still liable to capture, together with contractors and every one present with a force on business connected with it, on the ground of the direct services which they are engaged in rendering. Finally, sailors on board enemy's trading vessels become prisoners because of their fitness for immediate use on ships of war [1]. The position of surgeons and chaplains, apart from the Convention of Geneva,

[1] Bluntschli, §§ 594–6; Manuel de Droit Int. à l'Usage des Officiers de l'Armée de Terre (French Official Handbook), 37; American Instruct., art. 50; Project of Declaration of Brussels, § 34; Heffter, § 126. M. Bluntschli, the American Instructions, and the Project of Declaration include correspondents of newspapers among persons liable to be made prisoners of war. Probably it is only meant that they may be detained if their detention is recommended by special reasons. All persons however can be made prisoners for special reasons; newspaper correspondents in general seem hardly to render sufficiently direct service to justify their detention as a matter of course; and they are quite as often embarrassing to the army which they accompany as to its enemy. Perhaps it is unfortunate that they are enumerated as subjects of belligerent right together with persons who are always detained. The Manual of the Institut de Droit International (art. 22) directs that newspaper correspondents shall be detained for so long only as military necessity may dictate.

In 1870 Count Bismarck denied that sailors found in merchant vessels can be made prisoners of war, and in a note addressed to the government of the National Defence threatened to use reprisals if those who had been captured were not liberated. In justification of his doctrine he pretended that the only object of seizing merchant seamen is to diminish the number of men from whom the crews of privateers could be formed, and that therefore as France was a party to the Declaration of Paris, it must be supposed that it had 'adhered in advance' to their immunity from capture. The Comte de Chaudordy had no difficulty in showing that no such inference could be drawn from the fact of adherence to the Declaration of Paris, that the usage of capturing sailors had been invariable, that the mercantile marine of a nation, apart from any question of privateering, is capable of being transformed at will into an instrument of war, and that in countries where, as in Germany, all seafaring men are subject to conscription for the navy of the state, the reasons for capture are of double force (D'Angeberg, Nos. 580, 694, 813, 826, 911). Count Bismarck executed his threat to use reprisals, and sent Frenchmen of local importance as prisoners to Bremen in a number equal to that of the captains of merchantmen who were detained in France. The pretension of Count Bismarck to create an international rule by his simple fiat need scarcely be treated seriously, but it is a matter for indignation that he should attempt to prevent an adversary from acting within his undoubted rights by means which are reserved to punish and to brand violations of law.

is not fully determined. In the eighteenth century they were liable to capture, but on an exchange of prisoners they were commonly returned without equivalents or ransom. During the Peninsular War they shared the lot of other non-combatants. According to De Martens a usage had in his time grown up of sending them back to the enemy, and Klüber recognises their entire immunity; but as both writers class with them non-combatants of whose liability to capture there can be no doubt, the value of their evidence is open to question. More recently M. Heffter subjects surgeons and chaplains to seizure; and the American Instructions for armies in the field, by directing that they are only to be retained if the commander of the army capturing them has need of their services, render their dismissal a matter of grace[1]. On the whole it may be concluded that as the Convention of Geneva is not yet universally binding, belligerents, who are unfettered as respects their enemy by its obligations, still have the right to treat his medical staff as prisoners of war.

[1] Moser, ix. ii. 255 and 260. Cartel of exchange between England and France in 1798, De Martens, Rec. vi. 498. In some cases doctors, surgeons, and their assistants were returned without ransom long before any usage in their favour had begun to be formed. So far back as 1673 a provision to this effect was made in a cartel between France and the United Provinces, Dumont, vii. i. 231; and a like indulgence is stipulated for in the Anglo-French Cartel of 1780, De Martens, Rec. iii. 306. De Martens, Précis, § 276; Klüber, § 247; Heffter, § 126; American Instruct., art. 53. On Massena assuming command of the army of Portugal, Lord Wellington proposed that surgeons and officers of other civil departments should, if captured, be returned. At the moment an arrangement to this effect was believed by the French to be contrary to their interests, and no notice was taken of the suggestion; but after the seizure by Colonel Trant of the whole of the French hospitals at Coimbra, the same proposal was made by Massena in his turn. It does not appear whether under the then circumstances Lord Wellington would have acceded to it, as before any answer could be given it became known that an arrangement had been made between the English and French governments for a general exchange. Wellington Despatches, vii. 591. [Mr. Larpent, Judge-Advocate-General to the British forces in the Peninsular War, who was captured by the French in 1813, was treated as a prisoner of war and exchanged in the ordinary way. See his 'Private Journal,' ii. 103, where he says there was much difficulty about it. Under art. 3 of the Hague Convention non-combatants attached to armed forces of a belligerent 'have the right to be treated as prisoners of war.']

PART III CHAP. II Treatment of prisoners.

The rights possessed by a belligerent over his prisoners under the modern customs of war are defined by the same rule, that more than necessary violence must not be used, which ought to govern him in all his relations with his enemy. The seizure of a prisoner is the seizure of a certain portion of the resources of the enemy, and whatever is needed to deprive the latter of his resources during the continuance of the war may be done; a prisoner therefore may be subjected to such regulations and confined with such rigour as is necessary for his safe custody. Beyond this point or for any other object no severity is permissible. The enemy has been captured while performing a legal act, and his imprisonment cannot consequently be penal.

By the practice which is founded on these principles prisoners are usually interned in a fortress, barrack, or camp, where they enjoy a qualified liberty, and imprisonment in the full sense of the word is only permissible under exceptional circumstances, as after an attempt to escape, or if there is reason to expect that an attempt to escape will be made[1]. If a prisoner endeavours to escape, he may be killed during his flight, but if recaptured [it used to be held that] he cannot be punished, except by confinement sufficiently severe to prevent the chance of escape, because the fact of surrender as prisoner of war is not understood to imply any promise to remain in captivity[2]; [now, however, the Hague Convention subjects a prisoner of war to disciplinary punishment for attempting to escape]. A belligerent may exact obedience to rules necessary for safe custody under the sanction of punishment, and he also has the right of punishing in order to maintain discipline.

[1] Formerly a harsher practice obtained. During the wars of Independence and of the French Revolution and Empire, prisoners of war were often kept on board ships, and sometimes in common gaols. At a remoter period they were still worse treated,—prisoners were not only sent to the galleys, but were kept there after the termination of war. In 1630 it was stipulated between England and Spain that this should not be done, and the practice does not seem to have been wholly abandoned till near the end of the seventeenth century.

[2] Bluntschli, § 607; American Instruct., art. 77. [Hague Convention, art. 8.]

Prisoners are fed and clothed at the expense of the state which holds them in captivity, and they sometimes also receive an allowance of money[1]. The expenses thus incurred may be recouped by their employment on work suited to their grade and social position; provided that such work has no direct relation to the war[2]. Prisoners are themselves allowed to work for hire on their own account, subject to such regulations as the military authorities may make. In principle the right of the captor appears to be sufficiently just, and labour is obviously better for the health of the men than is unoccupied leisure in a confined space; but it might be wished that their privilege were held to

[1] It was formerly the custom for each state to pay the cost of the maintenance of its prisoners in the enemy's country, and when advances were made by the enemy for the subsistence of the prisoners, accounts were sometimes balanced from time to time during the war, and sometimes at its termination. Several treaties—e. g. those of Paris in 1763 (De Martens, Rec. i. 64), of Versailles in 1783 (id. ii. 465), between England and the United Provinces in 1783 (ib. 522), between the United States and Prussia in 1785 (ib. 577), of Amiens in 1802 (id. sup. ii. 565), of Paris in 1814 (Nouv. Rec. ii. 16), and of Ghent in 1814 (ib. 78)—contain stipulations for repayment of the amount expended on either side. See also Moser, Versuch, ix. ii. 272, and Wolff, Jus Gentium, § 816.

Under the more modern practice each state maintains the prisoners captured by it. Comp. Bluntschli (§ 605), Calvo (§ 1857), the proposed Declaration of Brussels (art. 27), and the Manual of the Institute (art. 69). In 1793 the French National Convention decreed that prisoners should be given the pay of a corresponding rank in the French service (De Martens, Rec. v. 370). During the war of 1870 France paid to officers from £4 to £13 10s. per month according to their rank, and to private soldiers 7.50 c. per day. Germany was not so liberal; privates received nothing, and officers from £1 16s. to £3 15s. per month. (D'Angeberg, No. 694.) [Article 17 of the Hague Convention provides that officers may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their Government.]

[2] Klüber, § 249; Heffter, § 129; Manuel de Droit Int. à l'Usage, &c., 74; American Instruct., art. 76; Project of Declaration of Brussels, art. 25; Manual of the Institute, arts. 71–2. Bluntschli (§ 608) would allow the employment of prisoners on any work which was not an 'immediate' relation to the war; they may be used to construct fortifications 'pendant que la lutte est encore éloignée.' He appears to stand alone. [Articles 4 to 20 of the Hague Convention are devoted to the treatment of prisoners of war. Article 14 provides for the establishment in each belligerent state of a 'Bureau de renseignements' to watch after the treatment of prisoners of war, to ascertain the various places of detention, to supply information to the relatives, and to undertake the delivery of letters and packages.]

overrule the right of the enemy, so that they could only be compulsorily employed in default of work yielding profit to themselves.

Dismissal of prisoners on parole.

Prisoners are often released from confinement or are dismissed to their own country on pledging their parole, or word of honour, to observe conditions which render them innocuous to their enemy. They are allowed to live freely within a specified district on undertaking not to pass the assigned bounds, or they return home on giving their word not to serve against the captor for a stated time or during the continuance of the war.

The release of prisoners in this manner is not necessarily an act of grace on the part of the captor; for it may often occur that his willingness to parol them may be caused by motives of convenience or by serious political or military reasons. Hence prisoners cannot be forced to give their parole, and their dismissal with a simple declaration by the enemy that they are paroled affects them with no obligation. So also non-commissioned officers and privates, who are not supposed to be able to judge of the manner in which their acceptance of freedom upon parole may touch the interests of their country, are not allowed to pledge themselves, except through an officer, and even officers, so long as a superior is within reach, can only give their word with his permission. Finally, the government of the state to which the prisoners belong may refuse to confirm the agreement, when made; and if this is done they are bound to return to captivity, and their government is equally bound to permit, or if necessary to enable, them to do so.

The terms upon which prisoners may be paroled are naturally defined by the character of the rights which their captor possesses over them. By keeping them in confinement he may prevent them from rendering service to their state until after the conclusion of peace. He may therefore in strictness require them to abstain not only from acts connected with the war, but also from engaging in any public employment. Generally however a belligerent contents himself with a pledge that his prisoner, unless exchanged, will not serve during the existing

PART III CHAP. II war against the captor or his allies engaged in the same war. This pledge is understood to refer only to active service in the field, and does not therefore debar prisoners from performing military duties of any kind at places not within the seat of actual hostilities, notwithstanding that the services thus rendered may have a direct effect in increasing the power of the country for resistance or aggression. Thus paroled prisoners may raise and drill recruits, they may fortify places not yet within the scope of military operations, and they may be employed in the administrative departments of the army away from the seat of war. As the right of a belligerent over his prisoners is limited to the bare power of keeping them in safe custody for the duration of the war, he cannot in paroling them make stipulations which are inconsistent with their duties as subjects, or which shall continue to operate after the conclusion of peace. Thus if prisoners are liberated on condition of not serving during a specified period, before the end of which peace is concluded and hostilities again break out, they enter upon the fresh war discharged from obligation to the enemy.

A prisoner who violates the conditions upon which he has been paroled is punishable with death if he falls into the hands of the enemy before the termination of the war[1]. [But the Hague Convention merely states that he loses the right to be treated as a prisoner of war, and 'peut être traduit devant les tribunaux.']

Prisoners may acquire their definite freedom during the continuance of war either by ransom or exchange.

Ransom. When the European nations, under the influence of Christianity, desisted from reducing their prisoners to slavery, they preserved a remnant of the ideas which they had before held,

[1] Vattel, liv. iii. chap. viii. § 151; Moser, Versuch, ix. ii. 369; De Martens, Précis, § 275; American Instruct., arts. 119–33; Bluntschli, §§ 617–26; Project of Declaration of Brussels, arts. 31–3. [Hague Convention, art. 12.]

The practice of paroling troops for a specified period was common in the eighteenth century; it is now usual to require an engagement not to serve during the duration of the war.

and regarded the individual captor as acquiring a right to get such profit by way of ransom out of his prisoner as the prospect of indefinite captivity would enable him to exact. So long as armies were composed of feudal levies or of condottieri this practice remained nearly undisturbed, and it only so far changed that prisoners of great importance became the property of the sovereign, and that the sums payable, which were at first dependent on agreement in each case, gradually became settled by usage according to a tolerably definite scale[1]. But in proportion as royal armies took the place of the earlier forms of levies, the sovereign who paid his soldiers took to himself the right of dealing with their prisoners in the manner best suited to his interests. Under the practice which thus became established in the seventeenth century, one mode of liberation continued to be by ransom, but this agreement instead of being personal became international, and a common scale under which either state should be allowed to redeem its prisoners was fixed by cartel either at the outbreaking of the war or from time to

[1] Edward III was amongst the first, if not the first, to take prisoners of consequence out of the hands of their captors. He was obliged however to buy them. (Lingard, Hist. of England, vol. iv. 107.) Before the end of the sixteenth century it had become an 'old custom' in England, France, and Spain, that dukes, earls, barons, or other persons *magni nominis*, should belong to the king (Ayala, De Jure et Off. Bell. § 27). The private interest of the actual captor however in prisoners of inferior rank died out very slowly. From a Proclamation of Charles I, of July 23, 1628, it seems that at that time it had not wholly disappeared in England; prisoners brought into the kingdom by private men were to be kept in prison at the charge of the captors, until they could be delivered by way of exchange or otherwise (Rymer, Fœdera, viii. ii. 270).

Gustavus Adolphus reserved to himself all prisoners of note taken by his troops, and recompensed the captor 'according to the quality of the person,' but left the prisoners of inferior rank to the takers, subject to the proviso that they should not be ransomed without the leave of a general officer. The Swedish Discipline (Lond. 1632), art. 101. Albericus Gentilis (De Jure Belli, lib. ii. c. 15) and Grotius (De Jure Belli et Pacis, lib. iii. c. xiv. § 9) mention rates of ransom customary in their day; the former stating the amount as the equivalent of the annual pay or income and pay of the prisoner, the latter as the equivalent of three months' or a month's pay, according as it would seem to the prisoner's rank. Probably Gentilis is speaking only of prisoners of superior, and Grotius of those of inferior, station.

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time during its continuance. Gradually this mode of recovering captive subjects became alternative with or supplementary to exchange, and of late has been so entirely superseded by it, that ransom might almost be regarded as obsolete, were it not that the possibility of its employment is contemplated by the American Instructions for Armies in the Field, and that as there is no moral objection to the practice, the convenience of particular belligerents might revive it at any moment[1].

Exchange.

Exchange consists in the simple release of prisoners by each of two belligerents in consideration of the release of prisoners captured by the other, and takes place under an agreement between the respective governments, expressed in a special form of convention called a Cartel[2]. As belligerents have a right to keep their prisoners till the end of the war, exchange is a purely voluntary arrangement, made by each party for his own convenience; it may therefore be refused by either, but if accepted it must evidently be based on the principle that equal values shall be given and received. Equality of value is roughly obtained by setting off the prisoners against each other, man by man according to their grade or quality, or by compensating for superiority of rank by the delivery of a certain number of inferior grade. But the principle of equality is not fully satisfied unless the prisoners handed over on one side are as efficient as those which are received from the other: if an officer is worth several privates, so also a disciplined soldier is worth more than a man

[1] Vattel, liv. iii. ch. viii. § 153, and ch. xvii. §§ 278-81; American Instruct., art. 108; Bluntschli, § 616. A Cartel of 1673 made between France and the United Provinces (Dumont, vii. i. 231) provided for ransom alternatively with exchange; and like agreements became common from that time. Examples of the rates of ransom paid in the eighteenth century for military officers and soldiers may be seen in Moser (Versuch, ix. ii. 390 and 408), and for naval officers and sailors in De Martens (Rec. iv. 287). The Cartel agreed to between England and France in 1780 (ib. 276), which provided for the ransom of members of the naval and military forces of the two nations, is the latest instance of such agreements; and since that time no prisoners have probably been ransomed except sailors captured in merchant vessels which have subsequently been released under a ransom bill.

[2] For cartels and matters connected with them, see postea, p. 550.

destitute of training, and a healthy man more than an invalid. A government therefore in proposing or carrying out an exchange is bound not to attempt to foist upon its enemy prisoners of lower value than those which it obtains from him[1].

Controversies between 1. England and the United States in 1777;

Some controversies have occurred which illustrate the bearing of this rule. In 1777 an agreement for an exchange of prisoners was made between General Washington and Sir W. Howe, in which it was merely stipulated that 'officers should be given for officers of equal rank, soldier for soldier, citizen for citizen.' When the agreement came to be carried out, the Americans objected that 'a great proportion of those sent out' by the English 'were not fit subjects of exchange when released, and were made so by the severity of their treatment and confinement, and therefore a deduction should be made from the list' to the extent of the number of non-effectives. Sir W. Howe, while denying the alleged fact of severe treatment, and referring the bad state of health of the prisoners to the sickness which is said to have prevailed in the American army at the time, fully granted 'that able men are not to be required by the party, who contrary to the laws of humanity, through design, or even neglect of reasonable and practicable care, shall have caused the debility of the prisoners he shall have to offer to exchange[2].'

2. England and France in 1810.

In 1810 negotiations for an exchange took place between England and France. At that time 43,774 French soldiers and sailors, together with 2,700 Dutch, Danes, and Russians, were prisoners in England. France on her part could only offer 11,458 efficient English, but she also held in custody 500 civilian 'détenus' and 38,355 Spaniards. The English government proposed an exchange of English as against French only; but the Emperor demanded that as the Spaniards were the allies of England they should be exchanged against French on like terms with the English, and *pari passu* with them so far that for every

[1] Vattel, liv. iii. ch. viii. § 153; American Instruct., arts. 105–6, 109; Bluntschli, §§ 612–14; Wheaton, Elem. pt. iv. ch. ii. § 3.

[2] Washington's Corresp., vol. iv. 439, 454, and Append. xiii and xiv; Moser, Versuch, ix. ii. 291–311.

three Frenchmen exchanged one Englishman and two Spaniards should be handed over. The difference of quality between English or French soldiers and Spanish troops rendered the pretension that all should be exchanged on equal terms an absurd one, and the British government refused at first to admit it. Afterwards in their anxiety to procure the release of the civilians detained in France they consented to a general exchange; making it only a condition of the agreement that the exchange should begin with the release of the English against an equivalent number of Frenchmen. Their caution was justified by the condition being rejected, and the negotiations consequently fell through [1].

It is the usage that in the absence of express stipulation exchanged prisoners must not take part in the existing war [2].

Under an old custom chaplains and members of the medical staff are given up on an exchange taking place without equivalents being demanded [3].

Rights of punishment and security.

A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands, of punishing innocent persons by way of reprisal for violations of law committed by others, and of seizing and keeping non-combatants as hostages for the purpose of enabling himself to give effect without embarrassment to his rights of war.

Punishment.

To the exercise of the first of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of universally acknowledged laws. Persons convicted of poisoning wells, of assassination, of marauding, of the use of a flag of truce to obtain information, or of employing weapons forbidden on the ground of the needless suffering caused by them, may be abandoned without hesitation to the fate which they

[1] Corresp. de Nap. i. xxi. 69; Ann. Register for 1811, p. 76.

[2] Bluntschli, § 613.

[3] For examples of early cartels in which stipulations for such surrender are contained, see Dumont, vii. i. 231; Pelet, Mém. Milit. relatifs à la Succ. d'Espagne, iii. 778; Moser, ix. ii. 397 and 418.

deserve. When however the act done is not universally thought to be illegitimate, and the accused person may therefore be guiltless of intention to violate the laws of war, it may be doubtful whether a belligerent is justified in enforcing his own views to any degree, and unquestionably he ought as much as possible to avoid inflicting the penalty of death, or any punishment of a disgraceful kind. In 1870 the Germans issued a proclamation under which French combatants, not possessing the distinguishing marks considered by their enemy to be necessary, were to be liable to the penalty of death, and in cases in which it was not inflicted were to be condemned to penal servitude for ten years, and to be kept in Germany until the expiration of the sentence[1]. The whole question by what kind of marks combatants should be indicated, and to what degree such marks should be conspicuous, was at the time an open one; if inadequate marks were used, they would be used in the vast majority of instances under the direction or permission of the national authorities; and the individual would as a rule be innocent of any intention to violate the laws of war. If the marks sanctioned by the French government were glaringly insufficient, there might be good reason for executing a few members of its irregular forces or for condemning some to penal servitude until the end of the war. But measures of this kind ought only to be threatened when disregard of the laws of war on the part of an enemy is clear; they ought only to be carried out in the last extremity; and it can never be legitimate to inflict a penalty extending beyond the duration of the war. To do so is to convert a deterrent into a punishment for crime; and in such cases as that in question a crime cannot be committed by the individual so long as he keeps within the range of acts permitted by his government. The case of individuals who outstep this range is of course a wholly different one.

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Reprisal, or the punishment of one man for the acts of another, Reprisal.

[1] The proclamation is given in Delerot, Versailles pendant l'Occupation, 104.

PART III CHAP. II is a measure in itself so repugnant to justice, and when hasty or excessive is so apt to increase rather than abate the irregularities of a war, that belligerents are universally considered to be bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent by which an enemy may be deterred from a repetition of his offence[1].

Seizure of hostages.

Hostages are often seized in order to ensure prompt payment of contributions and compliance with requisitions, or as a collateral security when a vessel is released on a ransom bill; more rarely they are used to guard against molestation in a retreat and for other like purposes[2]. Under a usage which has long become obligatory it is forbidden to take their lives, except during an attempt at escape, and they must be treated in all respects as prisoners of war, except that escape may be guarded against by closer confinement[3].

[1] Manuel de Droit Int. à l'Usage, &c., 25; American Instruct., arts. 27–8; Manual of the Institute, art. 86. See also the Articles on Reprisals submitted by the Russian Government to the Conf. of Brussels, Parl. Papers, Miscell. No. i. 1875, p. 109.

[2] Bluntschli, § 600; Moser, Versuch, ix. 395, and ix. ii. 458; Twiss, ii. 360; Valin, Ord. de la Marine, liv. iii. tit. ix. art. 19. The German army appears to take hostages almost as a matter of course when requisitioning and even when foraging; Von Mirus, Hülfsbuch des Kavalleristen, 2er Theil, Kap. 18. In Wolseley's Soldier's Pocket Book, p. 167, the seizure of hostages is recommended as a means of obtaining information. For hostages taken to guarantee the maintenance of order in occupied territory, see postea, p. 474.

[3] Vattel, liv. ii. ch. xvi. §§ 246–7; Bluntschli, § 600.

CHAPTER III

RIGHTS WITH RESPECT TO THE PROPERTY OF THE ENEMY

PART III CHAP. III Division of the subject.

Under the old customs of war a belligerent possessed a right to seize and appropriate all property belonging to an enemy state or its subjects, of whatever kind it might be, and in any place where acts of war are permissible. Gradually this extreme right has been tempered by usage under the influence of the milder sentiments of recent times. In a few directions it has disappeared; in most it has been restricted by limitations greater or less according to the nature of the property and the degree to which its seizure is possible or advantageous to the belligerent. The law upon the subject therefore is broken up into several distinct groups of rules corresponding to the differences indicated.

Those relating to the appropriation of the ultimate or eminent property possessed by the state in its territory may be put aside for the moment. As such appropriation cannot be completed until peace has been concluded or an equivalent state of things has been set up, they will find their proper place in another chapter. The remaining rules may be conveniently divided into the heads of those affecting—

1. State property other than ultimate territorial property, viz. moveables and land and buildings in which the immediate as well as the ultimate property is in the hands of the state.

2. Private property within the territory of its owner's state.

3. Private property within the jurisdiction of the enemy.

4. Private property in places not within the jurisdiction of any state.

Rough division of property

Behind the customs with respect to the appropriation of enemy property, and modelling them with tolerable, though not with

susceptible of appropriation from property insusceptible of appropriation.

complete consistency and success, may perhaps be found the principle that property can be appropriated of which immediate use can be made for warlike operations by the belligerent seizing it, or which if it reached his enemy would strengthen the latter either directly or indirectly, but that on the other hand property not so capable of immediate or direct use or so capable of strengthening the enemy is insusceptible of appropriation. Whether this is the case or not, there is at least a rough correspondence between the principle and accepted practice, which it may be worth while to keep in mind as a sort of guide to what may or may not be seized.

State property. Moveables.

As a general rule the moveable property of the state may be appropriated. Thus a belligerent seizes all munitions of war and other warlike materials, ships of war and other government vessels, the treasure of the state and money in cheques or other instruments payable to bearer, also the plant of state railways, telegraphs, &c. He levies the taxes and customs, and after meeting the expenses of administration in territory of which he is in hostile occupation, he takes such sum as may remain for his own use[1].

So far there is no question. A belligerent either seizes property already realised and in the hands of the state, or property which he may perhaps be considered to appropriate under a sort of mixed right, of which it is difficult to disentangle the elements, partly as moneys belonging to the state when they accrue due, and partly as private property appropriated according to a scale conveniently supplied by the amount of existing taxation. It is, no doubt, unsatisfactory to explain thus the latter kind of appropriation; and it probably can only be accounted for logically by adopting an inadmissible doctrine which will be discussed under the head of military occupation. The practice however is settled in favour of the belligerent.

But can he go further? Can he substitute himself for the

[1] From the taxes, customs, or other state revenues which an enemy may take for his own use must be excepted any which have been hypothecated by the state in payment of any loan contracted with foreign lenders before the commencement of the war.

invaded state, and appropriate moneys due upon bills or cheques requiring endorsement, or upon contract debts in any other form? Seizure in such case might not be direct; it might have to be enforced through the courts, and possibly through the courts of a neutral state; seizure also would not be effected once for all; upon the question of its validity or invalidity would depend whether the invaded state could demand a second payment at a future time. The matter is therefore one of considerable importance. The majority of writers, it would seem [1], consider funds in the shape contemplated to be amongst those which a belligerent can take. The arguments of M. Heffter and Sir R. Phillimore in a contrary sense appear however to be unanswerable. According to them, incorporeal things can only be occupied by actual possession of the subject to which they adhere. When territory is occupied, there are incorporeal rights, such as servitudes, which go with it because they are inherent in the land. But the seizure of instruments or documents representing debts has not an analogous effect. They are not the subject to which the incorporeal right adheres; they are merely the evidence that the right exists, 'or, so to speak, the title-deeds of the obligee.' The right itself arises out of the purely personal relations between the creditor and the debtor; it inheres in the creditor. It is only consequently when a belligerent is entitled to stand in the place of his enemy for all purposes, that is to say, it is only when complete conquest has been made and the identity of the conquered state has been lost in that of the victor, that the latter can stand in its place as a creditor, and gather in the debts which are owing to it [2].

[1] Heffter, § 134. Power to appropriate recoverable or negotiable debts or securities belonging to the state is recognised by the Manual of the Institute, art. 50. [But by art. 53 of the Hague Convention an army of occupation is only permitted to take possession of the cash, funds, and property liable to requisition belonging strictly to the state, and generally all moveable property of the state which may be used for military operations.]

[2] Heffter (§ 134) discusses the question tersely; Sir R. Phillimore (pt. xii. ch. iv) with extensive learning.

The latter writer remarks that the jurists who consider that the seizure of

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Land and buildings.

Land and buildings on the other hand may not be alienated. They may perhaps be conceived of as following the fate of the territory, and as being therefore incapable of passing during the continuance of war, though as the immediate property of the state is distinguishable from the ultimate or eminent property, this view would not be satisfactory; and it is more probable that the custom, which has now become compulsory, originally grew out of the impossibility of giving a good title to a purchaser. Purchase, unlike the payment of taxes, is a voluntary act; the legitimate government therefore in recovering possession is obviously under no obligation to respect a transaction in which the buyer knows that he is not dealing with the true owner.

An occupant may however seize the profits accruing from the real property of the state and may make what temporary use he can of the latter, subject it would seem to the proviso that he must not be guilty of waste or devastation. Thus he can use buildings to quarter his troops and for his administrative services, he receives rents, he can let lands or buildings and make other contracts with reference to them, which are good for such time as he is in occupation, and he can cut timber in the state forests; but in cutting timber, for example, apart from the local necessities of war, he must conform to the forest regulations of the country, or at least he must not fell in a destructive manner so as to diminish the future annual productiveness of the forests[1]. [In the words of the Hague Convention, he 'must

an instrument representing a debt carries with it the right to exact payment from the debtor appear to have been misled by supposed analogies of Roman law. As in the cases contemplated by that law intention to transfer the right is supposed, and the instrument is understood to be handed over as a bequest or donation in proof of the right, the analogy is not evident.

[1] In 1870 the German government sold 15,000 oaks growing in the state forests of the Departments of the Meuse and the Meurthe. After the conclusion of peace the French government seized those which had not already been removed. The purchasers appealed to the German government; but the latter, recognising that it had exceeded its rights, replied that the matter must be left to the judgment of the French Courts, which annulled the sale as being wasteful and excessive. Journal de Droit Int. Privé, 1874, p. 126. [See Hague Convention, art. 55.]

protect the capital of these properties and administer it according to the rules of usufruct.']

State property attributed to the maintenance of hospitals, &c.

From the operation of this general right to seize either the totality, or the profits, of property according to its nature are excluded property vested in the state but set permanently apart for the maintenance of hospitals, educational institutions, and scientific or artistic objects, and also the produce of rates and taxes of like kind levied solely for local administrative purposes[1].

Archives, &c.

It is also forbidden to seize judicial and other legal documents or archives and state papers, except, in the last case, for specific objects connected with the war. The retention of such documents is generally of the highest importance to the community to which they belong, but the importance is as a rule rather of a social than of a political kind; their possession by an invader, save in the rare exception stated, is immaterial to him; their seizure therefore constitutes a wanton injury.

Contents of museums, &c.

Although the matter is sometimes treated as being open to doubt, there seems to be no good ground for permitting the appropriation of works of art or the contents of museums or libraries. If any correspondence ought to exist between the right of appropriation and the utility of a thing for the purposes of war, it is evident that the objects in question ought to be exempted. There is besides a very persistent practice in their favour; though it must be admitted that the major part of that practice has been prompted by reasons too narrow to support a rule of exemption as things are now viewed. During the eighteenth century works of art and the contents of collections were spared, as royal palaces were spared, on the ground of the personal courtesy supposed to be due from one prince to another. Museums and galleries are now regarded as national property. The precedents afforded by last century are consequently scarcely in point. But usage has remained unchanged. Pictures and

[1] Manuel de Droit Int. à l'Usage, &c., 2e ptie, tit. iv. ch. i. § 1; American Instruct., arts. 31 and 34; Manual of the Institute, arts. 52–3; Halleck, ii. 97; Bluntschli, §§ 646, 648. [Hague Convention, art. 56.]

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statues and manuscripts have not been packed in the baggage of a conqueror, except during the campaigns of the Revolution and of the first French Empire. The events which accompanied the conclusion of peace in 1815 were not of a kind to lend value to the precedents which those campaigns had created. The works of art which had been seized for the galleries of Paris during the early years of the century were restored to their former owners; and Lord Castlereagh in suggesting their restoration by a note addressed to the ministers of the allied powers on Sept. 11, 1815, pointed out that it was a duty to return them to the countries to which 'they of right belonged,' and stigmatised the conduct of France as 'a reproach to the nation by which it has been adopted.' A restoration effected in consequence of this note may be taken to be a solemn affirmation of the principle of exemption by all the great powers except France; and if the language of the Declaration on the laws of war proposed at the Conference of Brussels was somewhat ambiguous, the discussion reported in the Protocols shows that it was not wished to reserve a right of carrying off works of art, but to subject them to the momentary requirements of military necessity[1]. [And

[1] The practice or doctrine of exemption is indicated or stated by Moser (Versuch, ix. i. 159); De Martens (Précis, § 280); Klüber (§ 253); Calvo (§§ 1915–17). See also Manuel de Droit Int. à l'Usage, &c., p. 119. [Hague Convention, art. 56.]

Sir T. Twiss (§ 68) also seems to hold that public collections are exempt from capture, and quotes a case in which a collection of Italian paintings and prints taken by a British vessel on its passage from Italy to the United States in 1812 was restored to the Academy of Arts at Philadelphia on the ground that 'the arts and sciences are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the Law of Nations, as practised by all civilised countries.' For the documents relating to the restoration of the works of art in Paris in 1815 to their former owners, see De Martens, Nouv. Rec. ii. 632–50; in one of the despatches there given the Duke of Wellington speaks of the French appropriations as having been 'contrary to the practice of civilised war.'

Vattel and Heffter take no notice of the matter; Wheaton (pt. iv. ch. ii. § 6) refrains from giving any opinion of his own.

Halleck (ii. 104) and Bluntschli (§ 651) consider that the immunity of works of art and like objects is not obligatory on a belligerent. Sir Samuel

the practice is absolutely forbidden by the terms of the Hague Convention.]

Vessels engaged in scientific discovery.

Finally, vessels engaged in exploration or scientific discovery are granted immunity from capture. The usage began in the last century when Bougainville and La Pérouse appear to have been furnished with safe-conducts to protect them in the event of war breaking out during their voyage, and the French government in 1776 ordered all men of war and privateers to treat Captain Cook as a neutral so long as he abstained from acts of hostility. During the present century there have been several occasions on which there has been reason for behaving in a like manner, and on which accordingly vessels have been furnished with protections. The most recent of these was the despatch of the Austrian corvette Novara on a scientific expedition in 1859[1].

Private property within the territory of its owner's state. Land, &c.

Of the private property found by a belligerent within the territory of his enemy, property in land and houses, including property in them held by others than their absolute owners, was very early regarded as exempt from appropriation. The exemption was no doubt determined by reasons much the same as those which have been suggested as accounting for the prohibition to alienate state domains. Land being immoveable, its fate was necessarily attendant on the ultimate issue of hostilities; an invader could not be reasonably sure of continued possession for himself, nor could he give a firm title to a purchaser; and these impossibilities re-acted upon his mind so as to prevent him from feeling justified in asserting the land to be his.

Personal property.

Personal property on the other hand, until a late period,

Romilly's speech of February 20, 1816, which is sometimes quoted in favour of this view, merely objects to the restitution made by the allies, that the most valuable of the works of art seized by the French had been secured to them by treaty stipulations, and that the allies had no right to override treaties made between France and other states by unilateral acts of their own. This contention may be well founded enough, but of course it has nothing to do with the principle in question. Hansard, xxxiii. 759.

[1] Halleck, ii. 149; Calvo, § 2056.

consisted mainly in the produce of the soil, merchandise, coin, and moveables of value. It was therefore of such kind that much of it being intended to be destroyed in the natural course of use, an invader could render his ownership effective by consuming the captured objects, and that all of it was capable of being removed to a place of safety whither it might reasonably be supposed that its owner would be unable to follow it. Hence personal property remained exposed to appropriation by an enemy; and so late as the seventeenth century, armies lived wholly upon the countries which they invaded, and swept away what they could not eat by the exercise of indiscriminate pillage. But gradually the harshness of usage was softened, partly from an increase of humane feeling, partly for the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found, when war became systematic, that their own operations were embarrassed in countries of which the resources were destroyed. A custom grew of allowing the inhabitants of a district to buy immunity from plunder by the payment of a sum of money agreed upon between them and the invader[1], and by furnishing him with specified quantities of

[1] Both the Swedes and Imperialists commonly admitted towns to ransom during the Thirty Years' War; see the cases, e. g. of Munich, Würtzburg, Freisingen, and Rothenburg, which paid contributions to the Swedes, and those of Hildesheim, Spires, Bayreuth, and Altenburg, to the Imperialists. Swedish Intell. pts. ii. and iii. From the Army Regulations of Gustavus Adolphus may be seen the intimate connexion between the restriction of pillage and the sense of its bad effect on the efficiency of the soldiery. 'They that pillage or steale eyther in our land or in the enemies or from any of them that come to furnish our leaguer or strength, without leave, shall be punisht for it as for other theft. If it so please God that we beate the enemy either in the field or in his leaguer then shall every man follow the chace of the enemies; and no man give himself to fall upon the pillage, so long as it is possible to follow the enemy, and untill such time as he be assuredly beaten. Which done then may their quarters be fallen upon, every man taking what he findeth in his owne quarter.' The Swedish Discipline, London, 1632, p. 56. It would seem that as a general rule pillage was only permitted in the Swedish army after a battle or the capture of a town; the Swedish soldiers however were at that time far better organised and disciplined than those of any other country, and the habits of the Imperialists

articles required for the use of his army; and this custom has since hardened into a definite usage, so that the seizure of moveables or other personal property in its bare form has, except in a very few cases, become illegal.

The former custom of pillage was the most brutal among the recognised usages of war. The suffering which directly attended it was out of all proportion to the advantages gained by the belligerent applying it; and it opened the way to acts which shocked every feeling of humanity. In the modern usage, however, so long as it is not too harshly enforced, there is little to object to. As the contributions and requisitions which are the equivalents of compositions for pillage are generally levied through the authorities who represent the population, their incidence can be regulated; they are moreover unaccompanied by the capricious cruelty of a bombardment, or the ruin which marks a field of battle. If therefore they are compared, not merely with universal pillage, but with more than one of the necessary practices of war, they will be seen to be relatively merciful. At the same time if they are imposed through a considerable space of territory, they touch a larger proportion of the population than is individually reached by most warlike measures, and they therefore not only apply a severe local stress, but tend, more than evils felt within a narrower range, to indispose the enemy to continue hostilities.

Contributions and requisitions.

The regulated seizure of private property is effected by the levy of contributions and requisitions. Contributions are such payments in money as exceed the produce of the taxes, which, as has been already seen, are appropriated as public property. Requisitions consist in the render of articles needed by the army for consumption or temporary use, such as food for men and animals, and clothes, waggons, horses, railway material, boats, and other means of transport, and of the compulsory labour, whether gratuitous or otherwise, of workmen to make roads, to

were very different. [The pillaging of a town taken by assault is expressly forbidden by the Hague Convention, art. 28.]

drive carts, and for other such services[1]. The amount both of contributions and requisitions is fixed at the will of the invader[2]; the commander of any detached body of troops being authorised under the usual practice to requisition objects of immediate use, such as food and transport, while superior officers are alone permitted to make demands for clothing and other articles for effecting the supply of which some time is necessary[3], and con-

[1] It is constantly said, apparently on the authority only of De Garden, that the term 'requisition,' and the mode of appropriation signified by it, were both invented by Washington. The term may very possibly have been invented by him, but the practice is of much older date. Indeed, considering the difficulties of transport before his time, requisitions were most likely larger during the whole of the eighteenth century in proportion to the size of the armies employed than they now are. The use of the word contribution to express both contributions and requisitions has tended to keep the fact that the latter were exacted from becoming prominent; but there are plenty of passages in despatches and military memoirs in which the context shows that the word contribution is used of contributions in kind, that is to say of determinate quantities of specified articles furnished on the demand of an enemy by a given place or district. Not infrequently the levy of requisitions is plainly stated; and their systematic use is prescribed by Frederic II. 'If an army is in winter quarters in an enemy's country,' he says, 'the soldiers receive gratis bread, meat, and beer, which are furnished by the country.' A few lines further on he adds that 'the enemy country is bound to supply horses for the artillery, munitions of war, and provisions, and to make up any deficiency in money.' Les Principes Généraux de la Guerre, Œuv. xxviii. 91. Comp. Moser, Versuch, ix. i. 378.

[2] Towards the end of the seventeenth century the custom of making bargains with towns or districts by way of compounding for pillage seems to have been changed into one under which belligerent sovereigns at the commencement of war made arrangements with each other limiting the amount of the contributions which should be levied in their respective territories on invasion taking place, and fixing the conditions under which they should be imposed (Vattel, liv. iii. ch. ix. § 165); but in the eighteenth century usage again altered, and while contributions were invariably substituted for pillage, except in the case of towns taken by assault, the amount was usually settled in the same manner as at present. Moser (Versuch, ix. i. 376) gives both methods as used.

[3] In 1870, for example, an order issued by the commanders-in-chief of the German armies stated that 'tous les commandants de corps détachés auront le droit d'ordonner la réquisition de fournitures nécessaires à l'entretien de leurs troupes. La réquisition d'autres fournitures jugées indispensables dans l'intérêt de l'armée ne pourra être ordonnée que par les généraux et les officiers faisant fonctions de généraux.' D'Angeberg, No. 328. In 1797 Napoleon ordered that a general of division should not make 'd'autres réquisitions que celles nécessaires pour les objets de subsistance, pour les

tributions can be levied only by the commander-in-chief, or by the general of a corps acting independently. Hostages are sometimes seized to secure the payment or render of contributions and requisitions; and when the amount demanded is not provided by the time fixed, the invader takes such measures as may be necessary to enforce compliance at the moment or to guard by intimidation against future disobedience[1]. Receipts or 'bons de réquisition' are given in acknowledgment of the sums or quantities exacted in order that other commanders may not make fresh impositions without knowing the extent of those already levied, and to facilitate the recovery by the inhabitants from their own government of the amounts paid, if the latter determines on the conclusion of peace to spread the loss suffered over the nation as a whole[2].

transports indispensables, et pour les souliers;' all others were to be made by the commander-in-chief alone. Corresp. ii. 321. See also the Project of Declaration of Brussels, arts. 41–2.

[1] The nature of the methods which are sometimes used may be seen from the measures taken by the Germans in Nancy in January, 1871:—

'Considérant qu'après avoir requis 500 ouvriers, en vue d'exécuter un travail urgent, ceux-ci n'ont pas obtempéré à nos ordres; arrêtons:—

'1°. Aussi longtemps que ces 500 ouvriers ne se seront pas rendus à leur poste, tous les travaux publics du département de la Meurthe seront suspendus; sont donc interdits tous travaux de fabrique, de voirie, de rues ou de chemins, de construction et autres d'utilité publique.

'2°. Tout atelier privé qui occupe plus de dix ouvriers sera fermé dès à présent et aux mêmes conditions que pour les travaux prémentionnés; sont donc fermés tous ateliers de charpentiers, menuisiers, maçons, manœuvres, tous travaux de mine et fabriques de toute espèce.

'3°. Il est en même temps défendu aux chefs, entrepreneurs et fabricants, dont les travaux ont été suspendus, de continuer à payer leurs ouvriers.

'Tout entrepreneur, chef ou fabricant qui agira contrairement aux dispositions ci-dessus mentionnées, sera frappé d'une amende de 10 à 50,000 francs pour chaque jour où il aura fait travailler et pour chaque paiement opéré.

'Le présent arrêté sera révoqué aussitôt que les 500 ouvriers en question se seront rendus à leur poste, et il leur sera payé à chacun un salaire de 3 francs par jour.'

An intimation was at the same time made to the Mayor of Nancy which caused him to issue the following proclamation:—'Monsieur le Préfet de la Meurthe vient de faire à la mairie de Nancy l'injonction suivante: "Si demain mardi, 24 janvier, à midi, 500 ouvriers des chantiers ne se trouvent pas à la gare, les surveillants d'abord, et un certain nombre d'ouvriers ensuite, seront saisis et fusillés sur lieu."' D'Angeberg, Nos. 1016, 1017.

[2] On contributions and requisitions see Vattel, liv. iii. ch. ix. § 165; Moser,

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No usage is in course of formation tending to abolish or restrain within specific limits the exercise of the right to levy contributions and requisitions. The English on entering France in 1813, the army of the United States during the Mexican War, and the Allied forces in the Crimea, abstained wholly or in the main from the seizure of private property in either manner; but in each case the conduct of the invader was dictated solely by motives of momentary policy, and his action is thus valueless as a precedent. There is nothing to show that the governments of any of the countries mentioned have regarded the levy of contributions and requisitions as improper; and that of the United States, while allowing its generals in Mexico to use their discretion as to the enforcement of their right, expressly affirmed it in the instructions under which they acted [1]. One of the articles of the proposed Declaration of Brussels, had it become law, wou[ld] have deprived an invader of all right to levy contributions exc[ept] in the single case of a payment in money being required in [lieu] of a render in kind, and would therefore have enabled him [as] a maximum to demand a sum not greater than the value o[f] articles needed for the use and consumption of the army an[d] actually requisitioned [2]. But so long as armies are of the p[resent] size it may be doubted whether the inhabitants of an oc[cupied] territory would gain much by a rule under which an i[nvader]

Versuch, ix. i. 375–83; Halleck, ii. 109–14; Bluntschli, § 653 ... §§ 1933–9; Manuel de Droit Int. à l'Usage, &c., 2e ptie, tit. iv. ch. iii ... of the Institute, arts. 56, 58, and 60. [Hague Convention, arts. 48, 49, ...

[1] Mr. Marcy's Instructions to Gen. Taylor, quoted by Halleck, ii. ... Treaty of Guadalupe Hidalgo, which closed the Mexican war, pro[vided that] during any future hostilities requisitions shall be paid for 'at a[n equitable] price if necessity arise to take anything for the use of the armed f[orces].' Martens, Nouv. Rec. Gén. xiv. 34. Probably the treaty of 1785 b[etween the] United States and Prussia (id. Rec. ii. 576) is the only other in w[hich this] provision is contained, and the article directing that private ... taken should be paid for was struck out when the treaty was rene[wed] (id. sup. ii. 226).

[2] The so-called contributions by way of fine, or as equivalent ... payable ... on to its own government, which are ... of course contributions in the prope[r sense] ...

would keep possession of so liberal a privilege; and though the representatives of some minor states put forward the view that a belligerent ought to pay or definitively promise to pay for requisitioned articles, the scheme of declaration as finally settled gave to the right of requisition the entire scope which is afforded by the so-called 'necessities' of war; [and this view has been followed in the Hague Convention][1]. It must not be forgotten that in the war of 1870–1 the right of levying contributions and requisitions was put in force with more than usual severity[2].

Whether contributions and requisitions are a form of appropriation of private property.

The subject of the appropriation of private property by way of contribution and requisition cannot be left without taking notice of a doctrine which is held by a certain school of writers, and which the assailants of the right of maritime capture use in the endeavour to protect themselves against a charge of inconsistency. It is denied that contributions and requisitions are a form of appropriation of private property. As pillage is not now permitted, payments in lieu of it must, it is said, have become illegal when the right to pillage was lost; a new 'juridical motive' must be sought for the levy of contributions and requisitions; and it is found in 'a right, recognised by public law as belonging to an occupying belligerent, to exercise sovereign authority to the extent necessary for the maintenance

[1] Declaration of Brussels, arts. 40–1 [and Hague Convention, arts. 49, 52], and see Parl. Papers, Miscell. i. 1875, 97–9, 102–9, 128.

[2] The language of some writers (Heffter, § 131; Bluntschli, §§ 653–5; Calvo, §§ 1938–9) might at first sight be supposed to mean that under the existing rules of law articles or services can only be obtained by requisition on payment of their value. A closer examination shows this construction to be hasty. According to M. Heffter the payment is to be provided for by the terms of peace; in other words, the invader merely pays if his enemy becomes strong enough to compel him to do so. M. Bluntschli says that 'il faut dédommager les propriétaires, et d'après les principes du droit naturel, cette tâche incombe en première ligne à l'état qui saisit ces biens et les emploie à son profit. Si les réclamations dirigées contre cet état n'aboutissent pas, l'équité exigerait que l'état sur le territoire duquel la réquisition a eu lieu fût rendu subsidiairement responsable.' But he remarks elsewhere that 'l'armée ennemie manque la plupart du temps de l'argent nécessaire; elle se bornera donc en général à constater le paiement des contributions.... Les réquisitions sont donc la plupart du temps pour les particuliers un mal inséparable de la guerre et qui doit être supporté par ceux qui en sont atteints.'

and safety of his army in the occupied country, where the power of the enemy government is suspended by the effect of his operations.' Private property is thus not appropriated, but 'subjected to inevitable charges' laid upon it in due course of ordinary public law[1]. It is not the place here to discuss the assertion that an invader temporarily stands in the stead of the legitimate sovereign. It is enough for the moment to say that the legal character of military occupation will be shown later to be wholly opposed to the doctrine of such substitution, that in order to find usages of occupation which require that doctrine to explain them it is necessary to go back to a time of less regulated violence than the present, that taking occupation apart from any question as to contributions and requisitions practice and opinion have both moved steadily away from the point at which substitution was admitted, and that thus the theory which affects to be a progress is in truth a retrogression[2]. On the minor point of the alleged necessity of the charges laid by way of contribution and requisition on the population of an occupied territory, it can hardly be requisite to point out that no such necessity exists. It is often impracticable to provide subsistence and articles of primary necessity for an army without drawing by force upon the resources of an enemy's country; labour is often urgently wanted, and when wanted it must be obtained; but there is nothing to prevent a belligerent from paying on the spot or giving acknowledgments of indebtedness binding himself to future payment. If a state cannot afford to pay, it simply labours under a disadvantage inseparable from its general position in the world, and identical in nature with that which weighs upon a country of small population or weak frontier. Whether states cannot or will not pay, fictions cannot be admitted into law in order to disguise the fact that private property is seized. That its seizure is effective, and that seizure as now managed is a less violent practice than many with which belligerent popula-

[1] See for example Bluntschli, Du Droit du Butin, Rev. de Droit Int. ix. 545.
[2] Comp. postea, p. 469.

tions unhappily become familiar, has been already said. It may be indulged in without shame while violence is legitimate at all; and so long as the practice lasts, it will be better to call it honestly what it is than to pretend that it is authorised by a right which a belligerent does not possess and a necessity that does not exist.

Under what conditions contributions and requisitions may be levied by a naval force.

Thus far contributions and requisitions have been considered with tacit reference to that phase of warfare only, viz. warfare on land, with which they have hitherto been associated. But the great increase which has taken place in several countries in the number of rich undefended coast towns, the larger facilities for making descents upon them which are afforded by the use of steam, and, finally, certain recent indications that the levy of money under threat of attack may be used as a means of offence in the next naval war, render it necessary to consider whether the exaction of requisitions is a permissible incident, and the levy of contributions a permissible form, of hostilities conducted by a naval force.

In 1882 Admiral Aube, in an article on naval warfare of the future, expressed his opinion that 'armoured fleets in possession of the sea will turn their powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and will burn them and lay them in ruins, or at the very least will hold them mercilessly to ransom;' and he pointed out that to adopt this course would be the true policy of France, in the event of a war with England [1]. There is no reason to believe that either political or naval opinion in France dissented from these views [2];

[1] Revue des Deux Mondes, tom. l. p. 331.

[2] The French government, on being asked by the British government whether it accepted responsibility for Admiral Aube's articles, dissociated itself from him; but a repudiation, which was immediately followed by his appointment as Minister of Marine, and by the adoption of a scheme of naval construction in accordance with his views, could have no serious value. His proposals met with the approval of the newspaper press. They were supported and exceeded in various articles spread over a considerable space of time by 'Un Officier de la Marine' in the Nouvelle Revue, and in the

very shortly after their publication Admiral Aube was appointed Minister of Marine; and he was allowed to change the ship-building programme of the country, and to furnish it with precisely the class of ships needed to carry them out. During the English Naval Manœuvres of 1888, an attempt was made to bring home to the inhabitants of commercial ports what the consequences of deficient maritime protection might be, by inflicting imaginary bombardments and levying imaginary contributions upon various places along the coast. Mr. Holland objected to these proceedings on the ground that they might be cited by an enemy as giving an implied sanction to analogous action on his part. A correspondence followed, in which several naval officers of authority combated Mr. Holland's objections, partly on the ground that, in view of foreign naval opinion on the subject, an enemy must be expected to attack undefended English towns, partly on the ground that attack upon them would be a legitimate operation of war[1]. Still more significant is the fact, which has become known, that in 1878 it was intended by the Russian government that the fleet at Vladivostock should sail for the undefended Australian ports and lay them under contribution immediately on the outbreak of hostilities.

Two questions are suggested by the above indications of opinion and of probable action on the part of naval powers. First, the restricted one, whether contributions and requisitions can legitimately be levied by a naval force under threat of bombardment, without occupation being effected by a force of debarkation; and, secondly, the far larger one, whether the bombardment and devastation of undefended towns, and the accompanying slaughter of unarmed populations, is a proper means of carrying on war. The latter question will find its answer elsewhere[2].

Requisitions may be quickly disposed of. They are not likely

Revue des Deux Mondes by M. Charmes, whose position and influence in the Foreign Office renders his utterances noticeable. The only voice raised against them was that of Admiral Bourgois in 1885 (Nouvelle Revue).

[1] *The Times*, August, 1888.

[2] See postea, p. 536.

to be made except under conditions in which a demand for the articles requisitioned would be open to little, if any, objection. A vessel of war or a squadron cannot be sent to sea in an efficient state without having on board a plentiful supply of stores identical with, or analogous to, those which form the usual and proper subjects of requisition by a military force. It is only in exceptional and unforeseen circumstances that a naval force can find itself in need of food or of clothing; when it is in want of these, or of coal, or of other articles of necessity, it can unquestionably demand to be supplied wherever it is in a position to seize; it would not be tempted to make the requisition except in case of real need; and generally the time required for the collection and delivery of large quantities of bulky articles, and the mode in which delivery would be effected, must be such that if the operation were completed without being interrupted, sufficient evidence would be given that the requisitioning force was practically in possession of the place. In such circumstances it would be almost pedantry to deny a right of facilitating the enforcement of the requisition by bombardment or other means of intimidation [1].

Contributions stand upon a different footing. They do not find their justification in the necessity of maintaining a force in an efficient state; they must show it either in their intrinsic reasonableness, or in the identity of the conditions, under which they would be levied, with those which exist when contributions are levied during war upon land. Such identity does not exist. In the case of hostilities upon land a belligerent is in military occupation of the place subjected to contribution; he is in it, and remains in it long enough to deprive the inhabitants of the equivalent of the contribution demanded, by plundering the town, or by seizing and carrying off the money and the valuables

[1] If articles are requisitioned which are not needed for the efficiency of the force, such as articles of luxury, or articles which will not be used by it, but will be turned into money, a disguised contribution is of course levied, and the propriety or impropriety of the demand must be judged by the test of the propriety or the impropriety of contributions.

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[1] See postea, p. 533. It is to be regretted that the officers who levied imaginary contributions during the British Naval Manœuvres of 1889 acted in a manner which in war would have been wholly indefensible. At Peterhead two officers were sent in with a message demanding a large sum within two hours under penalty of bombardment; a very large sum was in like manner demanded of Edinburgh by a force which could not possibly have ventured to set foot on land. [The Institute of International Law, at their meeting at Venice in 1896, condemned the bombardment of open towns by a naval force for the purpose of obtaining a ransom or merely to bring pressure on a belligerent. It sanctioned the practice, however, 'aux fins

Foraging.

Foraging consists in the collection by troops themselves of forage for horses, and of grain, vegetables, or animals as provision for men, from the fields or other places where the materials may be found. This practice is resorted to when from want of time it would be inconvenient to proceed by way of requisition. With it may be classed the cutting of wood for fuel or military use.

Booty.

Booty consists in whatever can be seized upon land by a belligerent force, irrespectively of its own requirements, and simply because the object seized is the property of the enemy. In common use the word is applied to arms and munitions in the possession of an enemy force, which are confiscable as booty, although they may be private property; but rightly the term includes also all the property which has hitherto been mentioned as susceptible of appropriation.

Property in territorial waters of its own state.

Enemy's property within the territorial waters of its own state is subject to the same rules which affect enemy's property in places not within the jurisdiction of any power.

Private property within the jurisdiction of the enemy.

Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always now be looked upon with extreme disfavour, it would be unsafe to declare that it is not generally within the bare rights of war.

Moneys lent to the state.

In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a state is not confiscated, and the interest payable upon it is not sequestrated. Whether this habit has been dictated by self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honour, because a Prince cannot be compelled like other men in an adverse way by a Court of Justice,' it is now so confirmed that in the absence

d'obtenir par voie de réquisitions ou de contributions ce qui est nécessaire pour la flotte.' Annuaire de l'Institut, xv. 150.]

of an express reservation of the right to sequestrate the sums placed in its hands on going to war a state in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances [1].

Other property.

Real property, merchandise and other moveables, and incorporeal property other than debts due by the state itself, stand in a less favourable position. Although not appropriated under the usual modern practice they are probably not the subjects of a thoroughly authoritative custom of exemption. During the middle ages time was often given to merchants at the outbreak of war to withdraw with their goods from a belligerent country, but the indulgence was never transformed into a right, and at the beginning of the seventeenth century all kinds of property belonging to an enemy were habitually seized. In the course of that century milder practices began to assert themselves, and it became unusual to appropriate land, though its revenues were taken possession of during the continuance of war, and confiscations sometimes occurred so late as the war of the Spanish Succession. In the treaties of peace made in 1713 between France and Savoy,

[1] Writers in international law frequently support their statement of the above unquestioned rule by reference to the Anglo-Prussian controversy of 1753, and to the conduct of the British government with respect to the Russian Dutch Loan during the Crimean War. The King of Prussia, by way of reprisal for the capture of Prussian vessels engaged in prohibited commerce, while himself at peace with Great Britain, seized certain funds which had been lent by English subjects upon the security of the Silesian revenues, and which he had bound himself to repay under the treaties of Breslau and Dresden. The facts of the case are not therefore in point; but they are connected with the rule under consideration through the statement of law put out by the English government, which went beyond the necessities of the moment and covered the case of a loan as between enemy states. The reason for which mention is made of the Russian Dutch Loan is not easy to divine. The English government simply paid interest during the war to the agents of the Russian government upon a debt which Great Britain had taken over from Holland under a treaty in which, the circumstances being somewhat exceptional, it was provided specifically that payment should not cease in case of war. To have stopped payment would have been, not merely to disobey a rule of law, but to be false to an express engagement.

the United Provinces and the Empire, it was stipulated that confiscations effected during the preceding war should be reversed [1]. During the eighteenth century the complete appropriation of real property disappeared, but its revenues continued to be taken, or at least to be sequestrated; and property of other kinds was sometimes sequestrated and sometimes definitely seized. In order to guard in part against these effects of acknowledged law it was stipulated in many commercial treaties that a specified time varying from six months to a year should be allowed for the withdrawal of mercantile property on the outbreak of war [2]; but property of other kinds was still governed by the general rule, and cases frequently occurred, owing to the absence of special stipulations, in which mercantile property was sequestrated or subjected to confiscation. In the Treaties of Campo Formio, Lunéville, Amiens, Friedrichshamm, Jönköping, and Kiel, and in those between France and Wurtemberg and France and Baden in 1796, and between Russia and Denmark in 1814, and between France and Spain in the same year, it was necessary to provide for the removal of sequestrations which had been placed upon incomes of private persons and upon debts [3]; at the commencement of war between England and Denmark in 1807, the former power seized and condemned the Danish ships lying in British waters, and the

[1] Dumont, viii. i. 365, 367, 419.

[2] The treaty of 1786 between England and France, and that of 1795 between England and the United States, permitted the subjects of the respective states to continue their trade during war unless their conduct gave room for suspicion, in which case twelve months were to be allowed for winding up their affairs; and the latter treaty provided that in no case should 'debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in the public funds or in the public or private banks,' be sequestrated. (Article x.)

[3] De Martens, Rec. vii. 208 (Campo Formio), id. 536 (Lunéville), id. sup. ii. 563 (Amiens); Nouv. Rec. i. 27 (Friedrichshamm); ib. 224 (Jönköping); ib. 674 (Kiel); Rec. vi. 670 (France and Wurtemberg); ib. 679 (France and Baden); Nouv. Rec. i. 681 (Denmark and Russia); Hertslet, Map of Europe by Treaty, i. 36 (France and Spain). The confiscation of English property in France in 1793 and the sequestration of English property by Russia in 1800 have not been instanced in the text, because, being in violation of the treaties of 1786 and 1797, they were mere acts of lawlessness.

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latter confiscated all ships, goods and debts within the kingdom which belonged to English subjects; in 1812 also the majority of the Supreme Court of the United States held that, though enemy property within the territory at the outbreak of war could not be condemned in the then state of the law of the United States, it was competent for the legislature to pass a law authorising confiscation, and Justice Story considered that no legislative act was necessary, and that 'the rule of the law of nations is that every such exercise of authority is lawful, and rests in the sound discretion of the nation[1].' Since the end of the Napoleonic wars the only instance of confiscation which has occurred was supplied by the American Civil War, in which the Congress of the Confederate States, by an Act passed in August 1861, enacted that 'property of whatever nature, except public stocks and securities held by an alien enemy since the 21st May 1861, shall be sequestrated and appropriated[2].' The custom which has become general of allowing the subjects of a hostile state to reside within the territory of a belligerent during good behaviour brings with it as a necessary consequence the security of their property within the jurisdiction, other than that coming into territorial waters, and indirectly therefore it has done much to foster a usage of non-confiscation; but as it is not itself strictly

[1] Wolff against Oxholm, vi Maule and Selwyn, 92; Brown v. the United States, viii Cranch, 110. De Martens remarks, both in the early editions of his Précis, and in those which appeared down to 1822, that 'là où il n'y a point de lois ou de traités sur ce point, la conduite des puissances de l'Europe n'est rien moins qu'uniforme' (§ 268). Lord Ellenborough was obviously mistaken in saying in the course of his judgment in Wolff against Oxholm that the 'Ordinance of the Court of Denmark stands single and alone, not supported by any precedent. . . . No instance of such confiscation except the Ordinance in question is to be found for more than a century.'

[2] Lord Russell to Acting Consul Cridland. State Papers, 1862, lxii. No. i. 108. All persons domiciled within the States with which the Confederate States were at war were held to be subject to the provisions of the Act. On this point Lord Russell remarked that 'whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilised times, are so rare and have been so generally condemned that it may almost be said to have become obsolete.'

obligatory, it cannot confer an obligatory force, and the treaties which contain stipulations in the matter, though numerous, are far from binding all civilised countries even to allow time for the withdrawal of mercantile property[1].

Upon the whole, although, subject to the qualification made with reference to territorial waters, the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was until lately too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom as a matter of strict law; and as it is sanctioned by the general legal rule, a special rule of immunity can be established by custom alone. For the present therefore it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of any instance of confiscation in the more recent European wars, no less than the common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse[2].

[1] Most of these treaties will be found to contain stipulations either that 'merchants and other subjects' shall have the privilege of remaining and continuing their trade 'as long as their conduct does not render them objects of suspicion,' or that 'persons established in the exercise of trade or special employment' shall be allowed so to remain, other persons being given time to wind up their affairs. Others merely stipulate for a term during which the subjects of the contracting parties should be at liberty to withdraw with their property after the outbreak of war from the enemy's country. Sequestration and confiscation have been expressly forbidden by a convention between the United States and France in 1800 (De Martens, Rec. vii. 484) and by a number of treaties during the last century, to which, with scarcely an exception, one of the parties is a South American state. It might be argued not unfairly that if like treaties do not exist between European countries, and between them and the United States, it is because there has been for a long time little fear that the right guarded against would be exercised by well-regulated states.

[2] Some writers suggest that 'whenever a government grants permission to foreigners to acquire property within its territories, or to bring and deposit

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Property entering territorial waters of the enemy after the commencement of war.

Enemy property entering territorial waters after the commencement of war is subject to confiscation.

Apart from an indulgence which has sometimes been granted in recent wars, and which will be mentioned on a later page[1], the only exceptional practice which claims to be of some authority is one of exempting from capture shipwrecked vessels, and vessels driven to take refuge in an enemy's port by stress of weather or from want of provisions. There are one or two cases in which such exemption has been accorded. In 1746 an English man-of-war entering the Havana, and offering to surrender, was

it there, it tacitly promises protection and security' (Hamilton's Letters of Camillus, quoted by Woolsey, § 124, note); but, as is properly remarked by Dana (note to Wheaton, § 308), 'persons who either leave their property in another country or give credit to a foreign citizen, act on the understanding that the Law of Nations will be followed whatever that may be. To argue therefore that the rule under the Law of Nations must be to abstain from confiscation because the debt or property is left in the foreign country on the public faith of that country seems to be a petitio principii.'

It is evident that although it is within the bare rights of a belligerent to appropriate the property of his enemies existing within his jurisdiction, it can very rarely be wise to do so. Besides exposing his subjects to like measures on the part of his adversary, his action may cause them to be obliged to pay debts twice over. The fact of payment to him is of course no answer to a suit in the courts of the creditor's state; and property belonging to the debtor coming into the jurisdiction of the latter at a subsequent time might be seized in satisfaction of the creditor's claim.

For recent opinion upon the whole question of the rights of a belligerent with respect to property of his enemy within his jurisdiction, see Dana (note to Wheaton, § 305), Woolsey (Introd. to Int. Law, § 124), Twiss (ii. §§ 56 and 59), Calvo (§§ 1671–8), Heffter (§ 140).

In delivering judgment in the case of the Johanna Emilie during the Crimean War Dr. Lushington said, 'With regard to an enemy's property coming to any port of the kingdom or being found there being seizable, I confess I am astonished that a doubt could exist on the subject. ... There are many instances in which a capture has been made in port by non-commissioned captors. ... If the property was on land, according to the ancient law it was also seizable; and certainly during the American War there were not wanting instances in which such property was seized and condemned by law. That rigour was afterwards relaxed. I believe no such instance has occurred from the time of the American War to the present day,—no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the crown, if it thought fit.' Spinks, 14.

[1] See postea, p. 449.

given means of repairing damages and was allowed to leave with a passport protecting her as far as the Bermudas; in 1799 a Prussian vessel called the Diana which had taken refuge in Dunkirk was restored by the French courts; and a few years afterwards an English frigate in distress off the mouth of the Loire was saved from shipwreck and allowed to leave without being captured. But a French Ordonnance of the year 1800 prescribed a contrary conduct, and in the same year the precedent of the Diana was reversed and a vessel which had entered a French port under like circumstances was condemned. Some writers, without asserting that a rule of exemption exists, think that justice, or humanity, or generosity demand that a belligerent shall refuse to profit by the ill-fortune of his enemy. Whether this be so or not—and in the case of a ship of war at any rate a generosity would seem to be somewhat misplaced which furbishes arms for an adversary, and puts them in his hands, without making any condition as to their use—it is clear that a belligerent lies under no legal obligations in the matter[1].

Private property in places not within the territory of any state.

In places not within the territorial jurisdiction of any power, that is to say for practical purposes, on non-territorial seas, property belonging to enemy subjects remains liable to appropriation, save in so far as the usage to this effect is derogated from by certain exceptional practices, to be mentioned presently.

Theory of the immunity of private property at sea from capture.

That the rule of the capture of private property at sea has until lately been universally followed, that it is still adhered to by the great majority of states, that it was recognised as law by all the older writers, and is so recognised by many late writers, is uncontested[2]. A certain amount of practice however exists

[1] Pistoye et Duverdy, ii. 89; Ortolan, Dip. de la Mer, liv. iii. ch. viii; Halleck, ii. 152; Calvo, § 2054.

[2] The existing law will be found stated within the present century either with approval, or without disapproval, by De Martens (Précis, § 281), Kent (Comm. pt. i. lect. v), Klüber (§§ 253-4), Wheaton (Elem. pt. iv. ch. ii. § 7), Manning (p. 183), Hautefeuille (tit. iii. ch. ii. sect. iii. § 1), Ortolan (Dip. de la Mer, liv. iii. ch. ii), Heffter (§ 137), Riquelme (i. 264), Twiss (ii. § 73), Phillimore (iii. § cccxlvii), Dana (Notes to Wheaton's Elem., No. 171), Negrin (tit. ii. cap. iv).

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of recent date in which immunity of private property from capture has been agreed to or affirmed; and a certain number of writers attack warmly, and sometimes intemperately, both the usage of capture itself, and the state which is supposed to be the chief obstacle to its destruction[1]. It becomes therefore necessary to see what value can be attached to the practice in question and to the new doctrines.

Practice in its favour.

Turning the attention first to practice and to indications of national opinion, the United States is found, under the presidency of Mr. Monroe, proposing to the governments of France, England, and Russia that merchant vessels and their cargoes belonging to subjects of belligerent powers should be exempted from capture by convention. Russia alone accepted the proposal in principle, but refused to act upon it until it had been also accepted by the maritime states in general. Again in 1856, Mr. Marcy, in refusing on the part of the United States to accede to the Declaration of Paris, by which privateering was abolished, stated that as it was a cardinal principle of national policy that the country should not be burdened with the weight of permanent armaments, the right of employing privateers must be retained unless the safety of the mercantile marine could be legally assured, but he offered to give it up if it were conceded that 'the private property of the subjects of one or other of two belligerent powers should not be subject to capture by the vessels of the other party, except in cases of contraband of war.' That the United States, as might be expected from its situation, has remained willing to consent to the abolition of the right to capture private property at sea, is shown by two more recent facts. In 1870 Mr. Fish expressed his hope to Baron Gerolt that 'the government and people of the United States may soon be gratified by seeing the principle' of the immunity of private property at

[1] Vidari (Del rispetto della proprietà privata fra gli stati in guerra), Calvo (§ 2108), De Laveleye (Du Respect de la Propriété Privée en Temps de Guerre), Bluntschli (Du Droit de Butin, Rev. de Droit Int. tom. ix and x), Fiore (Nouv. Droit Int. pt. ii. ch. vii, viii). M. F. de Martens has written a pamphlet in Russian on the subject.

sea 'universally recognised as another restraining and humanising influence imposed by modern civilisation on the art of war;' and in 1871 a treaty was concluded with Italy by which it is stipulated that private property shall not be seized except for breach of blockade or as contraband of war. Italy had already shown its own disposition in a decisive manner by passing a marine code in 1865, by which the capture of mercantile vessels of a hostile nation by Italian vessels of war is forbidden in all cases in which reciprocity is observed. Austria and Prussia on the outbreak of the war of 1866 declared that enemy ships and cargoes should not be captured so long as the enemy state granted a like indulgence, and hostilities were accordingly carried on both as between those states and as between Austria and Italy without the use of maritime capture. Finally, in 1870 the Prussian government issued an ordonnance exempting French vessels from capture without any mention of reciprocity [1]. In the above facts is comprised the whole of the international practice which can be adduced in favour of the new doctrine. They extend over a short time; they are supplied only by four states; to three out of these four the adoption of the doctrine as a motive of policy was recommended by their maritime weakness. Even therefore if it were not rash to assume that the views of the states in question would remain unchanged with a change in their circumstances, it is plain that up to now not only is there no practice of strength enough to set up a new theory in competition with the old rule of law, but that there are scarcely even the rudiments of such a practice.

Its relation to the general principles of law.

Is there then any sound theoretical reason for abandoning the right to capture private property at sea? Its opponents declare that it is in contradiction to the fundamental principle that war is 'a relation of a state to a state, and not of an individual to an

[1] De Laveleye, Du Respect de la Propriété Privée en Temps de Guerre; Bluntschli, Du Droit de Butin, Rev. de Droit Int. tom. ix.

In 1870 France acted upon the established law; in January 1871, consequently, Prussia changed her attitude, and stated her intention to make captures (D'Angeberg, No. 971).

PART III CHAP. III individual,' and that it constitutes the sole important exception to the principle of the immunity of private property from seizure, which is proclaimed to be a corollary of the former principle, and to have been besides adopted into international law by the consent of nations. The value of the first of these two principles, and its claims to form a part of international law, have been already examined in the chapter upon the general principles of the law governing states in the relation of war[1]. It may be judged whether it is true that capture at sea is a solitary exception to the immunity of private property in war by reading the section upon contributions and requisitions in the present chapter, together with the portion of the chapter on military occupation which is there referred to as bearing upon the assertion that contributions and requisitions are not a form of appropriation of private property.

Its moral aspect.

Finally, is there any moral reason for which maritime states ought to abandon their right of capturing private property at sea? Is the practice harsher in itself than other common practices of war; or, if it be not so, is it harsher in proportion to the amount of the stress which it puts upon an enemy, and so to the amount of advantage which a belligerent reaps from it? The question hardly seems worth answering. It is needless to bring into comparison the measures which a belligerent takes for the maintenance of his control in occupied country, or to look at the effects of a siege, or a bombardment, or any other operation of pure military offence. It is enough to place the incidents of capture at sea side by side with the practice to which it has most analogy, viz. that of levying requisitions. By the latter, which itself is relatively mild, private property is seized under conditions such that hardship to individuals—and the hardship is often of the severest kind—is almost inevitable. In a poor country with difficult communications an army may so eat up the food as to expose the whole population of a large district to privations. The stock of a cloth or leather merchant is seized;

[1] Antea, pt. i. ch. iii.

if he does receive the bare value of his goods at the end of the war, which is by no means necessarily the case, he gets no compensation for interrupted trade and the temporary loss of his working capital. Or a farmer is taken with his carts and horses for weeks or months and to a distance of a hundred or two hundred miles; if he brings back his horses alive, does the right to ask his own government at some future time for so much daily hire compensate him for a lost crop, or for the damage done to his farm by the cessation of labour upon it? It must be remembered also that requisitions are enforced by strong disciplinary measures, the execution of which may touch the liberty and the lives of the population; and that in practice those receipts which are supposed to deprive requisitioning of the character of appropriation are not seldom forgotten or withheld. Maritime capture on the other hand, in the words of Mr. Dana, 'takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance,' which by modern trading custom is invariably employed to protect the owner of property against maritime war risks, and which effects an immediate distribution of loss over a wide area. Mild however as its operation upon the individual is, maritime capture is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be. In deranging the common course of trade, in stopping raw material on its way to be manufactured, in arresting importation of food and exportation of the produce of the country, it presses upon everybody sooner or later and more or less; and in rendering sailors prisoners of war it saps the offensive maritime strength of the weaker belligerent. In face of the results that maritime capture has often produced it is idle to pretend that it is not among the most formidable of belligerent weapons; and in face of obvious facts it is equally idle to deny that there is no weapon the use of which causes so little individual misery.

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Conclusion.

Legally and morally only one conclusion is possible; viz. that any state which chooses to adhere to the capture of private property at sea has every right to do so[1]. It is at the same time to be noted that opinion in favour of the contrary principle is sensibly growing in volume and force; and it is especially to be noted that the larger number of well-known living international lawyers, other than English, undoubtedly hold that the principle in question ought to be accepted into international law. It is easy in England to underrate the importance of continental jurists as reflecting, and still more as guiding, the drift of foreign opinion[2].

[1] The question whether it is wise for states in general, or for any given state, to agree as a matter of policy to the abolition of the right of capture of private property at sea, is of course entirely distinct from the question of right. It may very possibly be for the common interests that a change in the law should take place; it is certainly a matter for grave consideration whether it is not more in the interest of England to protect her own than to destroy her enemies' trade. Quite apart from dislike of England, and jealousy of her maritime and commercial position, there is undoubtedly enough genuine feeling on the continent of Europe against maritime capture to afford convenient material for less creditable motives to ferment; and contingencies are not inconceivable in which, if England were engaged in a maritime war, European or other states might take advantage of a set of opinion against her practice at sea to embarrass her seriously by an unfriendly neutrality. The evils of such embarrassment might, or might not, be transient; there are also conceivable contingencies in which the direct evils of maritime capture might be disastrous. In the Contemporary Review for 1875 (vol. xxvi. pp. 737-51) I endeavoured to show that there are strong reasons for doubting whether England is prudent in adhering to the existing rule of law with respect to the capture of private property at sea. The reasons which were then urged have grown stronger with each successive year; and the dangers to which the practice would expose the country are at length fully recognised. That there is not a proportionately active wish for the adoption of a different rule is perhaps to be attributed to a doubt as to what the action of foreign powers would be under the temptation of a war with England.

[2] At the meeting of the Institute of International Law, held at the Hague in 1875, the following resolutions were adopted:—

'Il est à désirer que le principe de l'inviolabilité de la propriété privée ennemie naviguant sous pavillon ennemi soit universellement accepté dans les termes suivants, empruntés aux déclarations de la Prusse, de l'Autriche, et de l'Italie en 1866, et sous la réserve ci-après;—les navires marchands et leurs cargaisons ne pourront être capturés que s'ils portent de la contrebande de guerre ou s'ils essaient de violer un blocus effectif et déclaré.

'Il est entendu que, conformément aux principes généraux qui doivent

Exceptions to the rule that private property at sea may be captured.

The chief and most authoritative exception to the rule that enemy's goods at sea are liable to capture is made in favour of cargo shipped on board neutral vessels, which by an artificial doctrine are regarded as having power to protect it. As the modern usage in the matter forms a concession to neutrals, and has arisen out of the relation between them and belligerents, it will be convenient to treat of it together with the rest of the law belonging to that relation; and the only exceptions which claim to be noticed here are, the more doubtful one which exempts from seizure boats engaged in coast-fishing, and an occasional practice under which enemy's vessels laden with cargoes for a port of the belligerent are allowed to enter the latter and to reissue from it in safety.

Fishing-boats.

The doctrine of the immunity of fishing-boats is mainly founded upon the practice with respect to them with which France has become identified, but which she has by no means invariably observed. During the Anglo-French wars of the Middle Ages it seems to have been the habit of the Channel fishermen not to molest one another, and the French Ordonnances of 1543 and 1584, which allowed the Admiral of France to grant fishing-truces to subjects of an enemy on condition of reciprocity, did no more than give formal effect to this custom. It does not appear to what degree the power vested in the Admiral was used

régler la guerre sur mer aussi bien que sur terre, la disposition précédente n'est pas applicable aux navires marchands qui, directement ou indirectement, prennent part ou sont destinés à prendre part aux hostilités.'

At the meeting of the Institute at Turin in 1882 a clause, asserting that 'la propriété privée est inviolable sous la condition de réciprocité et sauf les cas de violation de blocus,' &c., was inserted in a project for a Règlement international des prises maritimes, there adopted. Annuaire de l'Institut, 1877, p. 138, and 1882–3, pp. 182–5.

The Hague resolution, which merely expressed a desire for alteration in the law, was passed without a division, though under protest from the English members; at Turin, the more positive resolution was only carried by ten votes to seven, two English members being present. The difference is indicative of the stage at which opinion on the question has arrived.

M. Geffcken stands almost alone in urging, in an able note to Heffter (p. 319, ed. 1883), the adoption of the principle of immunity upon practical rather than upon legal or moral grounds.

during the early part of the seventeenth century, but by the Ordonnances of 1681 and 1692 fishing-boats were subjected to capture, and from that time until the war of American Independence both France and England habitually seized them. Throughout that war and in the beginning of the revolutionary wars both parties refrained from disturbing the home fisheries, but the English government in 1800 distinctly stated that in its view the liberty of fishing was a relaxation of strict right made in the interests of humanity, and revocable at any moment for sufficient reasons of war. The attitude of the French government is less clear. Napoleon no doubt complained that the seizure of fishing-boats was 'contrary to all the usages of civilised nations,' but as his declaration was made after the English government had begun to capture them on the ground that they were being used for warlike purposes, it is valueless as an expression of a settled French policy; it was merely one of those utterances of generous sentiment with which he was not unaccustomed to clothe bad faith. At a later time during the wars of the Empire the coast fisheries were left in peace[1]. The United States followed the same practice in the Mexican [and Spanish] wars; and France in the Crimean, Austrian, and German wars prohibited the capture of fishing-vessels for other than military and naval reasons[2].

In the foregoing facts there is nothing to show that much real

[1] Pardessus, Col. de Lois Marit. iv. 319; Ortolan, Dip. de la Mer, liv. iii. ch. ii; De Martens, Rec. vi. 511–14. The English courts gave effect to the doctrine of the English government; the French courts, on the other hand, appear to have considered the immunity of fishing-vessels to exist as of right. Lord Stowell said, 'In former wars it has not been usual to make captures of these small fishing-vessels; but this was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and as they are brought before me for my judgment they must be referred to the general principles of this court. . . . They are ships constantly and exclusively employed in the enemy's trade.' The Young Jacob and Johanna, i Rob. 20. La Nostra Segnora de la Piedad y Animas, Pistoye et Duverdy, i. 331.

[2] Calvo, ii. §§ 2049–52 [and see for the most recent American practice The Paquete Habana, 175 U. S. Reports, p. 677 and 189, p. 453].

difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing-vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption. It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardship on their owners, is as a measure of general application wholly ineffective against the hostile state. But it must at the same time be recognised that fishing-boats are sometimes of great military use. It cannot be expected that a belligerent, if he finds that they have been employed by his enemy, will not protect himself against further damage by seizing all upon which he can lay his hands; nor that he will respect them under circumstances which render their employment probable. The order to capture French fishing-boats given by the British government in 1800 was caused by the use of some as fire-vessels against the British squadron at Flushing, and of others with their crews to assist in fitting out a fleet at Brest; and it was intended that between 500 and 600 should form part of the flotilla destined for the invasion of England. They had before this time been largely used as privateers to prey upon British commerce in the Channel; and they continued to be so used. They lay about, apparently fishing, with most of their crews concealed; at night or in thick weather they drew alongside merchantmen, which were easily boarded and captured by surprise[1]. Any immunity which is extended to objects on the ground of humanity or of their own innocuousness, must be

[1] De Martens, Rec. vii. 295; Corresp. de Nap. i. viii. 483; Mahan, Influence of Sea Power upon the French Revolution and Empire, ii. 208.

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subject to the condition that they shall not be suddenly converted into noxious objects at the convenience of the belligerent; and it is not probable that states will consent to forego the advantages which they may derive from the use of their fishing-vessels in contingencies which cannot always be foreseen [1].

It has never been contended, except by the French at the beginning of the last century, that vessels engaged in deep-sea fishing are exempt from capture.

Enemy's vessels on their voyage at the outbreak of war to a belligerent port, &c.

Enemy's vessels which at the outbreak of war are on their voyage to the port of a belligerent from a neutral or hostile country, and even vessels which without having issued from an enemy or other foreign port have commenced lading at that time, are occasionally exempted from capture during a specified period. At the beginning of the Crimean war an Order in Council directed that 'any Russian merchant vessel which prior to the date of this Order shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.' France gave a like indulgence; and in 1870 German vessels which had begun to lade upon the date of the declaration of war were allowed to enter French ports without limit of time, and to reissue with a safe-conduct to a German port. In 1877 also, Turkish vessels were permitted to remain in Russian ports until they had taken cargo on board and to issue freely afterwards [2]. [In 1898 President McKinley issued a proclamation on

[1] M. Calvo (loc. cit.) seems to think that the principle of immunity is settled, and M. Heffter (§ 137) states the rule absolutely. M. Bluntschli (§ 667) considers that fishing-boats can only be captured while being actually used for a military purpose.

[2] London Gazette, March 29, 1854; Pistoye et Duverdy, i. 123; D'Angeberg, Nos. 194, 224, 326; Journal de St. Pétersbourg, 11/23 May, 1877. In 1870 England objected that in according the privilege then given an injustice was done to neutrals, since German ships bound for neutral ports or inversely remained liable to capture for due cause from the day of the commencement

April 20, allowing Spanish merchant vessels in United States ports to load their cargoes and depart up to May 21, with permission, if met at sea by a man of war, to continue their voyage should their papers be found on examination to be satisfactory. Spanish vessels sailing from a foreign to an United States port prior to the declaration of war were permitted to enter, discharge cargo, and depart without molestation. The corresponding Spanish proclamation merely gave a period of five days for United States vessels anchored in Spanish ports to depart.]

What constitutes a valid capture, and its effect.

It being the right of a belligerent sovereign to appropriate under specified conditions certain kinds of moveable property belonging to his enemy, the effectual seizure of such property in itself transfers it to him. Beyond this statement it is needless for legal purposes to go as between the captor and the original owner, because possession is evidence that an act of appropriation has been performed the value of which an enemy can always test by force. But it is possible for persons other than the captor or the owner to acquire interests in the property seized through its recapture, or through its transfer by the appropriator to a neutral or a friend; and as no one can convey a greater interest than he himself possesses, the existence of such interests depends upon whether the belligerent in the particular case has not only endeavoured to appropriate the property, but has given clear proof of his ability to do so. If objects which have duly passed to the captor are recaptured by an ally of the owner, they become the prize or booty of the recaptor, but if change of ownership has not taken place, they must be restored to the original possessor. So also if the original owner in the course of his war finds the objects which he has lost in the hands of a co-belligerent or a neutral, he may inquire whether they were effectually seized, and if not he may reclaim them. Thus it becomes necessary to determine in what effectual seizure consists.

of war. Equity appears certainly to demand that if a belligerent for his own convenience spares enemy's ships laden with cargoes destined for him, he should not put neutrals to inconvenience who have not had an opportunity of sending their goods in vessels which are free from liability to capture.

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To do this broadly is sufficiently easy. It is manifest that momentary possession, although coupled with the intention to appropriate the captured objects, affords no evidence of ability to retain them, and that a presumption of such ability can only be raised either by an acknowledgment of capture on the part of the owner, as when a vessel hauls down her flag in token of surrender, or by proof from the subsequent course of events that the captor, at the time of seizure, had a reasonable probability of keeping his booty or prize. But the latter test is in itself vague. It can only be applied through a more or less arbitrary rule, and consequently, as is usual in such cases, considerable varieties of practice have been adopted at different times and by different nations.

Early practice.

In the Middle Ages a captor seems, under the more authoritative usage, to have acquired property in things seized by him on their being brought within his camp, fortress, port, or fleet. It was provided in the Consolato del Mare that if a vessel was retaken before arriving in a place of safety, it was to be given up to the owners on payment of reasonable salvage; if afterwards, it belonged to the recaptors; and Ayala in the end of the sixteenth century lays down unreservedly that booty belongs to the captor when it has entered within his lines [1]. Before that time however a practice had become very general under which a captor was regarded as not acquiring ownership of a vessel or booty until after possession during twenty-four hours. This view found expression in a French Edict of 1584; it was very early translated into a custom of England, Scotland, and Spain; it seems to have been adopted by the Dutch in the first years of the Republic; and was taken in Denmark with respect to captured vessels [2]. In the seventeenth century therefore it was

[1] Consolato del Mare; Pardessus, Col. de Lois Marit. ii. 338–9 and 346; Ayala, De Jur. et Off. Bell. lib. i. c. ii. § 37; Albericus Gentilis, De Jure Belli, lib. iii. c. 17; Chief Justice Hale, Concerning the Customs of Goods exported and imported, Hargrave's Tracts, vol. i. The principle is that which was applied by Roman law to persons captured by an enemy: 'Antequam in praesidia perducatur hostium manet civis.'

[2] Pardessus, iv. 312; Hale, Customs of Goods, Hargrave's Tracts, i. 246;

on the way to become the ground of an authoritative rule. From that period however it has become continuously less and less general. The larger number of writers attribute an equal or greater authority to the opinion that property is lost by an owner only when the captured object has reached a place of safe custody; and as in countries governed by the Code Napoléon 'possession gives title in respect of moveables,' the rule that security of possession is the test of the acquisition of property is more in consonance with the municipal law of France and of the states which have usually followed its example in matters of International Law than the arbitrary rule of twenty-four hours; finally, the latter was abandoned by England in the seventeenth century[1]. Probably therefore it may now be said that, in so far as exceptional practices have not been formed, property in moveables is transferred on being brought into a place so secure that the owner can have no immediate prospect of recovering them. An exceptional mode of dealing with recaptured vessels has however become common, under which the transfer of property effected by capture is ignored as between the recaptor and the original owner, and therefore as the right

Rule that the captured property must be brought into a place of safe custody.

Grotius, De Jure Belli et Pacis, lib. iii. ch. vi. § 3, and Barbeyrac's note; Twiss, § 173. The rule is said to have been derived from, and very likely may have a common origin with, a game law of the Lombards, under which a hunter might recover possession during twenty-four hours of an animal killed or wounded by him.

[1] Zouch (Juris Fecialis Explicatio, pars ii. sect. viii) and Molloy (De Jure Marit. bk. i. c. 1. § 12), in the seventeenth century, Bynkershoek (Quæst. Jur. Pub. lib. i. c. iv), Wolff (Jus Gentium, § 860), and Vattel (liv. iii. ch. xii. § 196), in the eighteenth century, state the rule of deposit in a safe place absolutely. Lampredi (Jur. Pub. Theoremata, pars iii. ch. xiii. § 6) and Klüber (§ 254) thought that the twenty-four hours' rule had been established by custom. De Martens thinks that it is authoritative in continental warfare, but remarks that both practices are adopted at sea. Wheaton (Elem. pt. iv. ch. ii. § 11) mentions the two rules as alternative. Heffter (§ 136) says that the twenty-four hours' term 'a passé en usage chez quelques nations dans les guerres terrestres et maritimes. Toutefois il ne laisse pas de présenter certaines difficultés dans l'application, et il ne saurait être regardé comme une règle commune du droit international.' Lord Stowell considered that 'a bringing *infra praesidia* is probably the true rule' at sea; The Santa Cruz, 1 Rob. 60.

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to make direct seizure of property in continental warfare is now restricted within narrow limits, the general rule has been reduced to slight importance[1].

Evidence of intention to retain possession.

If capture, in order to be effectual, must be proved by a certain firmness of possession, it is evidently still more necessary that the captor shall show an intention to seize and retain his prize or booty. With respect to the latter no difficulty can arise. The fact of custody, when it exists at all, can be easily recognised. But a prize is often necessarily separated from the ship which has taken it, and though it is the usual, and where possible the obvious course, to secure a captured vessel by putting a prize-crew in her of sufficient strength to defeat any attempt at rescue, it may under some circumstances be impossible to spare a sufficient force, or even to place it on board. Hence a maritime captor is allowed to indicate his intention to keep possession by any act from which such intention may fairly be inferred. It has been held that he can establish his right of property as against subsequent captors by sending a single man on board, although the latter may exercise no control, and may not interfere with the navigation of the ship. So also when a vessel has been brought to, and obliged to wait for orders, and to obey the direction of the captor, but owing to the boisterousness of the weather has received no one on board, he has been considered to have taken effectual possession[2].

Disposal of captured property.

As the property in an enemy's vessel and cargo is vested in the state to which the captor belongs so soon as an effectual seizure has been made, they may in strictness be disposed of by him as the agent of his state in whatever manner he chooses[3]. So long as they were clearly the property of the enemy at the

[1] See postea, p. 493.

[2] The Grotius, ix Cranch, 370; The Resolution, vi Rob. 21; The Edward and Mary, iii Rob. 306.

[3] It is the invariable modern custom for the state to cede its interest in vessels belonging to private owners to the actual captors, and the property so ceded does not vest until adjudication has been made by a competent tribunal; but this is merely an internal practice, designed to prevent abuses, and has no relation to the date at which the property of the state is acquired.

time of capture, it is immaterial from the point of view of International Law whether the captor sends them home for sale, or destroys them, or releases them upon ransom. But as the property of belligerents is often much mixed up with that of neutrals, it is the universal practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy [1]. And though the right of a belligerent to the free disposal of enemy property taken by him is in no way touched by the existence of the practice, it is not usual to permit captors to destroy or ransom prizes, however undoubted may be their ownership, except when their retention is difficult or inconvenient.

General rule that it shall be brought into port for adjudication.

Perhaps the only occasions on which enemy's vessels have been systematically destroyed, apart from any serious difficulty in otherwise disposing of them, were during the American revolutionary war and that between Great Britain and the United States in 1812–14. On the outbreak of the latter war the American government instructed the officers in command of squadrons to 'destroy all you capture, unless in some extraordinary cases that shall clearly warrant an exception.' 'The commerce of the enemy,' it was said, 'is the most vulnerable point of the enemy we can attack, and its destruction the main object;

Destruction.

[1] Although the practice now exists for the benefit of neutrals, its origin is due to the fact that formerly the state abandoned a part only of the value of prizes to the actual captors. In Spain the enactment in the Partidas of 1266, which reserved a fifth of all prizes to the king 'por razon de señorío' (tit. xxvi. ley xxix, Pardessus, vi. 30), remained in force till after the time of Grotius. The Dutch government also took a fifth (Grotius, De Jure Belli et Pacis, lib. iii. cap. vi. § 24). In France the Admiralty claimed the tenth share of every prize until the war of 1756, when it was remitted for the first time to the captors (Valin, Ord. de la Marine, liv. iii. tit. ix. art. 32); and as in England a proclamation issued in May of that year gave 'sole interest in and property of every ship and cargo to the officers and seamen on board his Majesty's ships from and after the 17th of that month' during the continuance of the war with France (Entick's Hist. of the Late War, i. 414), it may be inferred that the Crown took a share at least in the prizes made during 1755 and the early part of 1756.

PART III CHAP. III and to this end all your efforts should be directed. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigour her destructive power, so long as her provisions and stores can be replenished, either from friendly ports or from the vessels captured.' Under these instructions seventy-four British merchantmen were destroyed[1]. The destruction of prizes by the ships commissioned by the Confederate States of America was not parallel because there were no ports into which they could take them with reasonable safety; and the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary[2].

[1] Mr. Bolles, Solicitor to the Navy; quoted in Parl. Papers, America, No. 2, 1873, p. 92.

[2] The view taken in the English courts as to the circumstances under which vessels should be destroyed may be illustrated from the judgment of Lord Stowell in the case of the Felicity (ii Dodson, 383): 'The captors fully justify themselves to the law of their own country which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the President, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy, enemy's property.' During the Crimean War Dr. Lushington said, 'it may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed the bringing into adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor, where there is no neutral property on board.' The Leucade, Spinks, 221. By the French Ordonnance of 1681 a captor 'ne pouvant se charger du vaisseau pris' was allowed to destroy it. The circumstances enumerated by Valin as justifying this course are 'lorsque la prise est de peu de valeur, ou qu'elle n'est pas assez considérable pour mériter d'être envoyée dans un lieu de sûreté; surtout s'il fallait pour cela affaiblir l'équipage du corsaire au point de ne pouvoir plus continuer la course avec succès;' and 'lorsque la prise est si délabrée par le combat ou par le mauvais temps qu'elle fait assez d'eau pour faire craindre

It is at the same time impossible to ignore the force of the consideration suggested by the government of the United States in the latter part of the foregoing extracts. It would be unwise to assume that a practice will be invariably maintained which has been dictated by motives not necessarily of a permanent character. Self-interest has hitherto generally combined with tenderness towards neutrals to make belligerents unwilling to destroy valuable property; but the growing indisposition of neutrals to admit prizes within the shelter of their waters, together with the wide range of modern commerce, may alter the balance of self-interest, and may induce belligerents to exercise their rights to the full [1].

qu'elle ne coule bas; lorsque le navire pris marche si mal qu'il expose l'armateur corsaire à la reprise; ou lorsque le corsaire, ayant aperçu des vaisseaux de guerre ennemis, se trouve obligé de prendre la fuite et que sa prise le retarde trop ou fait craindre une révolte.' Ord. de la Marine, ii. 281. In 1870 a French ship of war destroyed two German vessels, because from the large number of prisoners whom she had on board she was unable safely to detach prize crews. A claim for restitution in value being made by the owners, the prize court determined 'qu'il résultait des papiers de bord et de l'instruction que ces bâtiments appartenaient à des sujets allemands, que leur prise était donc bonne et valable; que la destruction ayant été causée par force majeure pour conserver la sûreté des opérations du capteur, il n'y avait pas lieu à répartition au profit des capturés; qu'en agissant comme ils avaient fait, les capteurs avaient usé d'un droit rigoureux sans doute, mais dont l'exercice est prévu par les lois de la guerre et recommandé par les instructions dont ils étaient porteurs.' Calvo, § 2817.

[1] Some authorities appear to look upon the destruction of captured enemy's vessels as an exceptionally violent exercise of the extreme rights of war. M. Bluntschli says that 'l'anéantissement du navire capturé n'est justifiable qu'en cas de nécessité absolue, et toute atteinte à ce principe constituerait une violation du droit international' (§ 672), and Dr. Woolsey calls 'the practice a barbarous one, which ought to disappear from the history of nations' (§ 148). It is somewhat difficult to see in what the harshness consists of destroying property which would not return to the original owner, if the alternative process of condemnation by a prize court were suffered. It has passed from him to the captor, and if the latter chooses rather to destroy than to keep what belongs to himself, persons who have no proprietary interest in the objects destroyed have no right to complain of his behaviour. Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter.

By the model 'règlement des prises maritimes' adopted by the Institut de Droit International at Turin in 1882 it is provided that a captor may burn or sink a captured vessel:—

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Ransom.

Ransom is a repurchase by the original owner of the property acquired by the seizure of a prize. As the agreement to ransom is a voluntary act on his part, and as he can always allow his vessel to be sent in for adjudication or to be destroyed, it must be supposed to be advantageous to him; the crew also is released under it, instead of becoming prisoners of war. The practice therefore constitutes a distinct mitigation of the extreme rights of capture[1].

When a vessel is released upon ransom the commander gives a Ransom Bill, by which he contracts for himself and the owner of the vessel and cargo that a stipulated sum shall be paid to the captor. A copy of the ransom bill is retained by himself, and serves as a safe-conduct protecting the vessel from seizure by ships of the enemy country or its allies, so long as a prescribed

'1. Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;
2. Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;
3. Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;
4. Lorsque le navire de guerre ne peut mettre sur le navire saisi un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;
5. Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné.' Annuaire de l'Institut, 1883, p. 221.

[1] The same reasons for which ransom is a mitigation of the rights of war cause most nations to be unwilling to allow captors to receive it. In England captors were formerly liable to fines for liberating a prize on ransom, unless the Court of Admiralty could be satisfied that 'the circumstances of the case were such as to have justified' the act. With respect to English ships captured by an enemy, the sovereign in council may permit or forbid contracts for ransom by orders issued from time to time, and any person entering into such contract in contravention of an order so issued may be fined to the extent of five hundred pounds. In France public vessels of war appear not to be prohibited from ransoming ships which they may have taken, but privateers could only do so with the consent of the owners. Spain allows ransom to be received by privateers which have taken three prizes, and which may therefore be assumed not to be in a condition to spare any portion of their crew. Russia, Sweden, Denmark, and the Netherlands wholly forbid the practice. The United States, on the other hand, permit contracts for ransom to be made in all cases. 27 and 28 Vict. c. 25; Règlement of 1803, De Martens, Rec. viii. 18; Twiss, ii. § 183; Calvo, § 2121; Pistoye et Duverdy, i. 280.

course is kept for a port of destination agreed upon. If the ransomed vessel voluntarily diverges from her course, or exceeds the time allowed for her voyage in the ransom bill, she becomes liable to be captured afresh, and any excess of value realised from her sale over the amount stipulated for in the bill then goes to the second captors; if on the other hand she is driven from her course or delayed by stress of weather, no penalty is incurred. The captor on his side, besides holding the ransom bill, usually keeps an officer of the prize as a hostage for the payment of the stipulated sum. If on his way to port, with the bill and hostage or either of them on board, he is himself captured, the owner of the prize is exonerated from his debt[1]; but as the bill and hostage are the equivalent of the prize, this consequence does not follow from his capture if both have previously arrived in a place of safety.

Foreign maritime tribunals rank arrangements for ransom among *commercia belli*; hence they allow the captor to sue directly upon the bill if the ransom is not duly paid. The English courts refuse to except such arrangements from the effect of the rule that the character of an alien enemy carries with it a disability to sue, and compel payment of the debt indirectly through an action brought by the imprisoned hostage for the recovery of his freedom[2].

Loss of property acquired by capture.

The property acquired through effectual seizure by way of booty or prize is devested by recapture or abandonment, and in the case of prize it is also lost by escape, rescue by the crew of the prize itself, or discharge. The effect of abandonment when the

[1] Twiss (ii. § 181), referring to Emérigon, Traité des Assurances, c. 12. sect. 23. § 8. But, as is remarked by Dr. Woolsey, who nevertheless acknowledges the authority of the practice, 'why, if the first captor had transmitted the bill, retaining the hostage who is only collateral security, should not his claim be still good?' Introd. to Int. Law, § 510.

[2] On the whole subject see Twiss, ii. §§ 180-2; Calvo, §§ 2123-7; Wheaton, Elem. pt. iv. ch. ii. § 28; Valin, Ord. de la Marine, liv. iii. tit. ix. art. xix. Anthon v. Fisher, ii Douglas, 650, note, and the Hoop, i Rob. 200, give the principles on which the English courts proceed.

If a ransomed vessel is wrecked the owner is naturally not exonerated from payment of the ransom.

property is found and brought into port by neutral salvors is perhaps not conclusive. By the courts of the United States at any rate it has been held that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners, it being considered that by the capture the captors acquire such a right of property as no neutral nation can justly impugn or destroy; consequently the proceeds, after deducting salvage, belong to the original captors, and neutral nations ought not to inquire into the validity of a capture between belligerents[1].

[1] The Mary Ford, iii Dallas, 188.

CHAPTER IV

MILITARY OCCUPATION

Nature of military occupation in its *primâ facie* aspect.

WHEN an army enters a hostile country, its advance, by ousting the forces of the owner, puts the invader into possession of territory, which he is justified in seizing under his general right to appropriate the property of his enemy. But he often has no intention of so appropriating it, and even when the intention exists there is generally a period during which, owing to insecurity of possession, the act of appropriation cannot be looked upon as complete. In such cases the invader is obviously a person who temporarily deprives an acknowledged owner of the enjoyment of his property; and logically he ought to be regarded either as putting the country which he has seized under a kind of sequestration[1], or, in stricter accordance with the facts, as being an enemy who in the exercise of his rights of violence has acquired a local position which gives rise to special necessities of war, and which therefore may be the foundation of special belligerent rights.

Theories with respect to it.

Self-evident as may seem to be this view of the position of an invader, when the intention or proved ability to appropriate his enemy's territory is wanting, it was entirely overlooked in the infancy of international law. An invader on entering a hostile country was considered to have rights explicable only on the assumption that ownership and sovereignty are attendant upon the bare fact of possession. Occupation, which is the momentary detention of property, was confused with conquest, which is the definitive appropriation of it. Territory, in common with all other property, was supposed, in accordance with Roman Law, to become a *res nullius* on passing out of the hands of its owner

Confusion of it with conquest down to the middle of 18th century.

[1] This is the view taken by Heffter (§ 131).

in war; it belonged to any person choosing to seize it for so long as he could keep it. The temporary possession of territory therefore was regarded as a conquest which the subsequent hazards of war might render transient, but which while it lasted was assumed to be permanent. It followed from this that an occupying sovereign was able to deal with occupied territory as his own, and that during his occupation he was the legitimate ruler of its inhabitants.

Down to the middle of the eighteenth century practice conformed itself to this theory. The inhabitants of occupied territory were required to acknowledge their subjection to a new master by taking an oath, sometimes of fidelity, but more generally of allegiance; and they were compelled, not merely to behave peaceably, but to render to the invader the active services which are due to the legitimate sovereign of a state[1]. Frederic II, in his General Principles of War, lays down that 'if an army takes up winter quarters in an enemy's country it is the business of the commander to bring it up to full strength; if the local authorities are willing to hand over recruits, so much the better, if not, they are taken by force;' and the wars of the century teem with instances in which such levies were actually made[2]. Finally,

[1] In the seventeenth century express renunciation of fealty to the legitimate sovereign was sometimes exacted. During the decadence of the usage in the eighteenth century an oath of allegiance was perhaps not required unless it was intended to retain the territory, and the promise of fidelity and obedience may have been taken as sufficient when it was wished to leave its fate in uncertainty. Swedish Intelligencer, pt. ii. 4; Moser, Versuch, ix. i. 231, 280, and ix. ii. 27; Memorial of the Elector of Hanover to the Diet of the Empire, Entick, Hist. of the Late War, ii. 425; De Martens, Précis, § 280; Heffter, § 132. [The Hague Convention (Arts. 44, 45) forbids any compulsion of the population of occupied territory to take part in military operations against its own country, or to take the oath to the hostile power.]

[2] Œuvres de Fréd. II. xxviii. 98. In 1743 Bavarian militia were used by the Austrians to fill up gaps in their Italian armies; in 1756 the Prussians on breaking into Saxony immediately required the States, who were in session, to supply 10,000 men, and two years afterwards 12,000 more were demanded. In 1759 the French made levies in Germany. Moser, Versuch, ix. i. 296, 389. It was sometimes necessary to stipulate on the conclusion of peace for the restitution of men taken in this

the territory itself was sometimes handed over to a third power while the issue of hostilities remained undecided; as in the case of the Swedish provinces of Bremen and Verden, which were sold by the King of Denmark during the continuance of war to the Elector of Hanover[1].

After the termination of the Seven Years' War these violent usages seem to have fallen into desuetude, and at the same time indications appear in the writings of jurists which show that a sense of the difference between the rights consequent upon occupation and upon conquest was beginning to be felt. In saying that a sovereign only loses his rights over territory which has fallen into the hands of an enemy on the conclusion of a peace by which it is ceded, Vattel abandons the doctrine that territory passes as a *res nullius* into the possession of an occupant, and in effect throws back an intrusive foe for a justification of such acts of authority as he may perform within a hostile country upon his mere right of doing whatever is necessary to bring the war to a successful conclusion[2]. But the principle which was thus admitted by implication was not worked out to its natural results. While the continuing sovereignty of the original owner became generally recognised for certain purposes, for other purposes the occupant was supposed to put himself temporarily in his place. The original national character of the soil and its inhabitants remained unaltered; but the invader was invested with a quasi-sovereignty, which gave him a claim as of right to the obedience of the conquered population, and the exercise of which was limited only by the qualifications, which gradually became established, that he must not as a general rule modify the permanent institutions of the country, and that he must not levy recruits for his army. The first portion of this self-contradictory doctrine, besides being a common-place of modern treatises, has, in several

Doctrine of temporary and partial substitution of sovereignty.

manner. See, for example, art. 8 of the Peace of Hubertsburg, De Martens, Rec. i. 140.

[1] Lord Stanhope, Hist. of England, ch. vii.

[2] Vattel, liv. iii. ch. xiii. § 197. Lampredi takes the same view, Jur. Pub. Univ. Theorem. pt. iii. c. xiii. § 6.

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countries, been expressly affirmed by the courts. In 1808, when the Spanish insurrection against the French broke out, Great Britain, which was then at war with Spain, issued a proclamation that all hostilities against that country should immediately cease. A Spanish ship was shortly afterwards captured on a voyage to Santander, a port still occupied by the French, and was brought in for condemnation. In adjudicating upon the case Lord Stowell observed: 'Under these public declarations of the state establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property[1].' In France the Cour de Cassation has had occasion to render a decision of like effect. In 1811, during the occupation of Catalonia, a Frenchman accused of the murder of a Catalan within that province was tried and convicted by the assize Court of the Department of the Pyrénées Orientales. Upon appeal the conviction was quashed, on the ground that the courts of the territory within which a crime is perpetrated have an exclusive right of jurisdiction, subject to a few exceptions not affecting the particular case, that 'the occupation of Catalonia by French troops and its government by French authorities had not communicated to its inhabitants the character of French citizens, nor to their territory the character of French territory, and that such character could only be acquired by a solemn act of incorporation which had not been gone through[2].' It is somewhat

[1] The Santa Anna, Edwardes, 182.

[2] Ortolan, Dip. de la Mer, liv. ii. ch. xiii. p. 324 ad finem. See also the American case of the American Insurance Company v. Canter, i Peters, 542. During the Mexican War the Attorney-General of the United States took the same view with respect to crimes committed during the occupation of Mexico as that adopted by the French courts in the Catalan murder case. Halleck, ii. 451. The continuance of the sovereignty of the state over its occupied parts is affirmed, though in the subordinate shape of a kind of 'latent title,' by Klüber, § 256; Wheaton, Elem. pt. iv. ch. iv. § 4, and Manning, ch. 5, among the earlier writers of this century. De Martens (Précis, § 280) would seem by his silence to adhere to the ancient doctrine.

curious that a principle which has sufficiently seized upon the minds of jurists to be applied within the large scope of the foregoing cases should not have been promptly extended by international lawyers to cover the whole position of an occupied country relatively to an invader. The restricted admission of the principle is the more curious that the usages of modern war are perfectly consistent with its full application. The doctrine of substituted sovereignty, and with it the corollary that the inhabitants of occupied territory owe a duty of obedience to the conqueror, are no longer permitted to lead to their natural results. They confer no privileges upon an invader which he would not otherwise possess; and they only now serve to enable him to brand acts of resistance on the part of an invaded population with a stigma of criminality which is as useless as it is unjust. Until recently nevertheless many writers, and probably most belligerent governments, have continued to hold that in spite of the unchanged national character of the people and the territory, the fact of occupation temporarily invests the invading state with the rights of sovereignty, and dispossesses its enemy, so as to set up a duty of obedience to the former and of disregard to the commands of the latter. The reasoning or the assumptions upon which this doctrine rests may be stated as follows. The power to protect is the foundation of the duty of allegiance; when therefore a state ceases to be able to protect a portion of its subjects it loses its claim upon their allegiance; and they either directly 'pass under a temporary or qualified allegiance to the conqueror,' or, as it is also put, being able in their state of freedom to enter into a compact with the invader, they tacitly agree to acknowledge his sovereignty in consideration of the relinquishment by him of the extreme rights of war which he holds over their lives and property [1]. It is scarcely necessary to point out

Examination of the doctrine.

[1] Klüber, § 256; De Martens, Précis, § 280; Mr. Justice Story in Shanks v. Dupont, iii Peters, 246; Halleck, ii. 462-4; Twiss, ii. § 64.

A recent instance of the assertion of substituted sovereignty by a belligerent government is supplied by the proclamation which Count Bismarck Bohlen, Governor-General of Alsace, issued on entering on his office in

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that neither of these conclusions is justified by the premises. Supposing a state to have lost its right to the allegiance of its subjects, the bare fact of such loss cannot transfer the right to any other particular state. The invaded territory and its inhabitants merely lie open to the acceptance or the imposition of a new sovereignty. To attribute this new sovereignty directly to the occupying state is to revive the doctrine of a *res nullius*, which is consistent only with a complete and permanent transfer of title. On the other hand, while it may be granted that incapacity on the part of a state to protect its subjects so far sets them free to do the best they can for themselves as to render valid any bargain actually made by them, the assertion that any such bargain as that stated is implied in the relations which exist between the invader and the invaded population remains wholly destitute of proof. Any contract which may be implied in these relations can only be gathered from the facts of history, and though it is certain that invaders have habitually exercised the privileges of sovereignty, it is equally certain that invaded populations have generally repudiated the obligation of obedience whenever they have found themselves possessed of the strength to do so with effect. The only understanding which can fairly be said to be recognised on both sides amounts to an engagement on the part of an invader to treat the inhabitants of occupied territory in a milder manner than is in strictness authorised by law, on the condition that, and so long as, they obey the commands which he imposes under the guidance of custom.

Recent doctrine.

In the face of so artificial and inconsistent a theory as that which has just been described it is not surprising that a tendency should have become manifest of late years to place the law of occupation upon a more natural basis. Recent writers adopt the view that the acts which are permitted to a belligerent in

August, 1870. It begins as follows: 'Les événements de la guerre ayant amené l'occupation d'une partie du territoire français par les forces allemandes, ces territoires se trouvent par ce fait même soustraits à la souveraineté impériale, en lieu et en place de laquelle est établie l'autorité des puissances allemandes.' D'Angeberg, No. 371.

occupied territory are merely incidents of hostilities, that the authority which he exercises is a form of the stress which he puts upon his enemy, that the rights of the sovereign remain intact, and that the legal relations of the population towards the invader are unchanged. If the same doctrine has not yet been expressly accepted by most of the great military powers, it is probably not premature to say that the smaller states are unanimous in its support, and the former at the Conference of Brussels at least consented to frame the proposed Declaration in language which implies it [1].

Conclusions.

Looking at the history of opinion with reference to the legal character of occupation, at the fact that the fundamental principle of the continuing national character of an occupied territory and its population is fully established, at the amount of support which is already given to the doctrines which are necessary to complete its application in detail, and to the uselessness of the illogical and oppressive fiction of substituted sovereignty, the older theories may be unhesitatingly ranked as effete, and the rights of occupation may be placed upon the broad foundation of simple military necessity.

Extent of the rights of a military occupant;

If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war [2]; in other words

[1] Calvo, § 1877; Rolin Jaequemyns, La Guerre actuelle dans ses Rapports avec le Droit International, p. 29; Heffter, § 131. Bluntschli, §§ 539–40 and 545, fully recognises the purely military character of the invader's authority, but seems somewhat to confuse the extreme inadvisability under ordinary circumstances of resisting it with the absence of right to resist. See also American Instruct., arts. 1 and 3. The text of the Project of Declaration of Brussels requires to be read in connexion with the discussions which took place at the Conference. The French Manuel de Droit Int. à l'Usage, &c. says (p. 93), 'L'occupation est simplement un état de fait, qui produit les conséquences d'un cas de force majeure; l'occupant n'est pas substitué en droit au gouvernement légal.'

[2] The right of appropriating all property of the enemy state which is

he has the right of exercising such control, and such control only, within the occupied territory as is required for his safety and the success of his operations. But the measure and range of military necessity in particular cases can only be determined by the circumstances of those cases. It is consequently impossible formally to exclude any of the subjects of legislative or administrative action from the sphere of the control which is exercised in virtue of it; and the rights acquired by an invader in effect amount to the momentary possession of all ultimate legislative and executive power. On occupying a country an invader at once invests himself with absolute authority; and the fact of occupation draws with it as of course the substitution of his will for previously existing law whenever such substitution is reasonably needed, and also the replacement of the actual civil and judicial administration by military jurisdiction. In its exercise however this ultimate authority is governed by the condition that the invader, having only a right to such control as is necessary for his safety and the success of his operations, must use his power within the limits defined by the fundamental notion of occupation, and with due reference to its transient character. He is therefore forbidden as a general rule to vary or suspend laws affecting property and private personal relations, or which regulate the moral order of the community [1]. Commonly also he has not the right to interfere with the public exercise of religion [2], or to restrict expression of opinion upon matters not

their limits.

separable from the occupied territory, e.g. the produce of taxes, is usually classed with rights of occupation (Bluntschli, § 545); it clearly flows however, not from any right of occupation, but from the general right of appropriation. Cf. antea, p. 431.

[1] If an occupant does forbidden acts of the above kind they cease to have legal effect from the moment that his occupation ceases. Compare a decision of the French Cour de Cassation, in 1841, in which it was laid down that acts which 'troublent la société et compromettent l'ordre public tombent de plein droit aussitôt que l'occupation cesse; si, d'autre part, ils concourent au bien-être de ce pays, et sont conformes aux intentions du souverain légitime, ils persistent jusqu'à leur abrogation expresse.' Journal Int. Privé, 1874, p. 224. Comp. also postea, p. 488.

[2] It would be an exception if, owing to the fanaticism of the population,

directly touching his rule, or tending to embarrass him in his negotiations for peace[1].

Practice in matters bearing on the security of the occupant.

The invader deals freely with the relations of the inhabitants of the occupied territory towards himself. He suspends the

the public performance of the ceremonies of their religion could not take place without risk of an excitement which might lead to outbreaks.

[1] Bluntschli, §§ 539-40; and comp. American Instruct., arts. 1-3. The manner in which the will of the invader acts under ordinary circumstances is thus described by the Duke of Wellington: 'Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all; therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law; and I carried into execution that my so declared will.' Hansard, 3rd Series, cxv. 881. Compare the Project of Declaration of Brussels, art. 3, and the decision of the delegated Commission of the Conference, made at the sitting of Aug. 22, that art. 3 shall be understood to mean that political and administrative laws shall be subject to suspension, modification, or replacement in case of necessity, but that civil and penal laws shall not be touched. Parl. Papers, Miscell. i. 1875, p. 120. On assuming the government of Alsace in 1870, Count Bismarck Bohlen declared that 'le maintien des lois existantes, le rétablissement d'un ordre de choses régulier, la remise en activité de toutes les branches de l'administration, voilà où tendront les efforts de mon gouvernement dans la limite des nécessités imposées par les opérations militaires. La religion des habitants, les institutions, et les usages du pays, la vie et la propriété des habitants jouiront d'une entière protection.' Proclam. of Aug. 30, D'Angeberg, No. 371. [Cf. Art. 43 of the Hague Convention, 'L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.'

The well-known definition of martial law quoted above from the Duke of Wellington must be limited to the case of alien enemies in a foreign country. The question whether a British commander has any right which the Civil Courts would recognise to supersede within British territory during war time the ordinary law is a far broader one. It assumed much importance both during the Boer invasions of Cape Colony and Natal and our own occupation of the annexed Dutch Republics, but it belongs clearly to the domain of constitutional rather than international law. The Privy Council in Ex parte Marais, L. R. 1902, A. C. 109, decided that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals; see also Law Quarterly Review, vol. xviii. pp. 117, 133, 152, for a discussion of the historical aspect of martial law. The confusion between *military* and martial law has been the cause of much loose speaking and writing.]

operation of the laws under which they owe obedience to their legitimate ruler, because obedience to the latter is not consistent with his own safety; for his security also, he declares certain acts, not forbidden by the ordinary laws of the country, to be punishable; and he so far suspends the laws which guard personal liberty as is required for the summary punishment of any one doing such acts. All acts of disobedience or hostility are regarded as punishable; and by specific rules the penalty of death is incurred by persons giving information to the enemy, or serving as guides to the troops of their own country, by those who while serving as guides to the troops of the invader intentionally mislead them, and by those who destroy telegraphs, roads, canals, or bridges, or who set fire to stores or soldiers' quarters [1]. If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or *en masse*, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or if captured be executed by sentence of court martial [2]. Sometimes the inhabitants of towns or districts in which acts of the foregoing nature have been done, or where they are supposed to have originated, are rendered collectively responsible, and are punished by fines or by their houses being burned. In 1871 the German governor of Lorraine ordered, 'in consequence of the destruction of the bridge of Fontenoy, to the east of Toul, that the district included in the Governor-Generalship of Lorraine shall pay an extraordinary contribution of 10,000,000 francs by way of fine,' and announced that 'the village of Fontenoy has been immediately burned.' In October 1870 the general commanding in chief the second German Army issued a proclamation declaring that all houses or villages affording shelter to Francs Tireurs would be burned, unless the Mayor of the Commune informed

[1] Bluntschli, §§ 631, 636, 641. Rolin Jaequemyns (Second Essai sur la Guerre Franco-Allemande, p. 30) remarks that while the right of inflicting death for such acts must be maintained, its actual infliction ought only to take place in exceptional cases.

[2] American Instruct., 85; Bluntschli, § 643.

the nearest Prussian officer of their presence immediately on their arrival in the Commune; all Communes in which injury was suffered by railways, telegraphs, bridges or canals, were to pay a special contribution, notwithstanding that such injury might have been done by others than the inhabitants, and even without their knowledge. A general order affecting all territory occupied or to be occupied had been already issued in August, under which the Communes to which any persons doing a punishable act belonged, as well as those in which the act was carried out, were to be fined for each offence in a sum equal to the yearly amount of their land-tax [1].

[1] D'Angeberg, Nos. 328, 854, and 1015. The following extract from the General Orders issued to the Prussian Army in August, 1870, gives a connected view of the acts punished by the Germans and of the penalties which they affixed to their commission:—

'1°. La juridiction militaire est établie par la présente. Elle sera appliquée dans toute l'étendue du territoire français occupé par les troupes allemandes à toute action tendant à compromettre la sécurité de ces troupes, à leur causer des dommages ou à prêter assistance à l'ennemi. La juridiction militaire sera réputée en vigueur et proclamée pour toute l'étendue d'un canton, aussitôt qu'elle sera affichée dans une des localités qui en font partie.

'2°. Toutes les personnes qui ne font pas partie de l'armée française et n'établiront pas leur qualité de soldat par des signes extérieurs et qui :

'(*a*) Serviront l'ennemi en qualité d'espions ;

'(*b*) Egareront les troupes allemandes quand elles seront chargées de leur servir de guides ;

'(*c*) Tueront, blesseront ou pilleront des personnes appartenant aux troupes allemandes ou faisant partie de leur suite ;

'(*d*) Détruiront des ponts ou des canaux, endommageront les lignes télégraphiques ou les chemins de fer, rendront les routes impraticables, incendieront des munitions, des provisions de guerre, ou les quartiers de troupes ;

'(*e*) Prendront les armes contre les troupes allemandes ;

seront punis de la peine de mort.

'Dans chaque cas, l'officier ordonnant la procédure instituera un conseil de guerre chargé d'instruire l'affaire et de prononcer le jugement. Les conseils de guerre ne pourront condamner à une autre peine qu'à la peine de mort. Leurs jugements seront exécutés immédiatement.

'3°. Les communes auxquelles les coupables appartiendront, ainsi que celles dont le territoire aura servi à l'action incriminée, seront passibles, dans chaque cas, d'une amende égale au montant annuel de leur impôt foncier.' D'Angeberg, No. 328.

A proclamation, issued on the occasion of the insurrection in Lombardy in 1796, shows the manner in which Napoleon dealt with risings in occupied countries :—

It has been confessed that it is impossible to set bounds to the demands of military necessity; there may be occasions on which a violent repressive system, like that from which the foregoing examples have been drawn, may be needed and even in the end humane; there may be occasions in which the urgency of peril might excuse excesses such as those committed by Napoleon in Italy and Spain. But it is impossible also not to recognise that in very many cases, probably indeed in the larger number, the severity of the measures adopted by an occupying army is entirely disproportioned to the danger or the inconvenience of the acts which it is intended to prevent; and that when others than the perpetrators are punished, the outrage which is done to every feeling of justice and humanity can only be forgiven where military necessity is not a mere phrase of convenience, but an imperative reality. [The language of the Hague Convention on this subject is somewhat lacking in precision: 'No general penalty,

'L'armée française, aussi généreuse que forte, traitera avec fraternité les habitants paisibles et tranquilles; elle sera terrible comme le feu du ciel pour les rebelles et les villages qui les protégeraient. Art. 1. En conséquence le général en chef déclare rebelles tous les villages qui ne se sont pas conformés à son ordre du 6 prairial (which was, Ceux qui, sous 24 heures, n'auront pas posé les armes et n'auront pas prêté de nouveau serment d'obéissance à la République, seront traités comme rebelles; leurs villages seront brûlés). Les généraux feront marcher contre les villages les forces nécessaires pour les réprimer, y mettre le feu, et faire fusiller tous ceux qu'ils trouveront les armes à la main. Tous les prêtres, tous les nobles qui seront restés dans les communes rebelles seront arrêtés comme otages et envoyés en France. Art. 2. Tous les villages où l'on sonnera le tocsin seront sur le champ brûlés. Les généraux sont responsables de l'exécution du dit ordre. Art. 3. Les villages sur le territoire desquels serait commis l'assassinat d'un Français seront taxés à une amende du tiers de la contribution qu'ils payaient à l'archiduc dans une année, à moins qu'ils ne déclarent l'assassin et qu'ils ne l'arrêtent, et le remettent entre les mains de l'armée. Art. 4. Tout homme trouvé avec un fusil et des munitions de guerre sera fusillé de suite, par ordre du général commandant l'arrondissement. Art. 5. Toute campagne où il sera trouvé des armes cachées sera condamnée à payer le tiers du revenu qu'elle rend, en forme d'amende. Toute maison où il sera trouvé un fusil sera brûlée, à moins que le propriétaire ne déclare à qui il appartient. Art. 6. Tous les nobles ou riches qui seraient convaincus d'avoir excité le peuple à la révolte, soit en congédiant leurs domestiques, soit par des propos contre les Français, seront arrêtés comme otages, transférés en France, et la moitié de leurs revenus confisquée.' Corresp. de Nap. i. i. 323, 327.

pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible[1].']

Hostages are sometimes seized by way of precaution in order to guarantee the maintenance of order in occupied territory. The usage which forbids that the life of any hostage shall be taken, for whatever purpose he has been seized or accepted, and which requires that he shall be treated as a prisoner of war, renders the measure unobjectionable; but in proportion as it is unobjectionable it fails to be deterrent. The temporary absence of a deposit which must be returned in the state in which it was received can only prevent action where it is a necessary means to action; and the detention of hostages when they are treated in a legal manner can only be of use if it totally deprives a population of its natural leaders[2]. Hence the seizure of hostages is less often used as a guarantee against insurrection than as a momentary expedient or as a protection against special dangers, which it is supposed cannot otherwise be met. In such cases a belligerent is sometimes drawn by the convenience of intimidation into acts which are clearly in excess of his rights. In 1870 the Germans ordered that 'railways having been frequently damaged, the trains shall be accompanied by well-known and respected persons inhabiting the towns or other localities in the neighbourhood of the lines. These persons shall be placed upon the engine, so that it may be understood that in every accident caused by the hostility of the inhabitants, their compatriots will be the first to suffer. The competent civil and military authorities together with the railway companies and the etappen commandants will organise a service of hostages to accompany the trains.' The order was universally and justly reprobated on the ground that it violated the principle which denies to a belligerent any further power than that of keeping his hostage in confinement; and it is for governments

[1] Hague Convention, art. 50.

[2] Napoleon endeavoured to do this in Italy in 1796. See Arts. 1 and 6 of Proclamation quoted above.

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to consider whether it is worth while to retain a right which can only be made effective by means of an illegal brutality which existing opinion refuses to condone[1]. [It is to be regretted that on some occasions during the South African War the British military authorities should have adopted a similar policy in the hope of stopping the epidemic of train-wrecking. Its futility, to say nothing of the question of humanity, was speedily recognised.]

Practice in administrative matters, &c.

It has been seen that the authority of the local civil and judicial administration is suspended as of course so soon as occupation takes place. It is not usual however for an invader to take the whole administration into his own hands. Partly because it is more easy to preserve order through the agency of the native functionaries, partly because they are more competent to deal with the laws which remain in force, he generally keeps in their posts such of the judicial and of the inferior administrative officers as are willing to serve under him, subjecting them only to supervision on the part of the military authorities, or of superior civil authorities appointed by him[2]. He may require persons so serving him to take an oath engaging themselves during the continuance of the occupation to obey his orders, and not to do anything to

[1] Order of the Civil Governor of Rheims. D'Angeberg, No. 686; Rolin Jaequemyns, La Guerre Actuelle, p. 32; Calvo, ii. 1868-71. Bluntschli (§ 600) says that the measure was 'peu recommandable.'

At St. Quentin and other places the Germans innocently but uselessly required hostages as a guarantee against the commission of irregular hostilities between the surrender of the town and the completion of its occupation. It is not easy to suppose that any hot-headed person who might be inclined to break into acts of violence at such a moment would be deterred by the prospect that two municipal counsellors would be prisoners in Germany until the end of the war.'

[2] In 1806 Napoleon, on occupying the greater part of Prussia, retained the existing administration under the general direction of a French official. Lanfrey, Hist. de Nap. i. iv. 25. The Duke of Wellington, on invading France, directed the local authorities to continue the exercise of their functions, apparently without appointing any English superior. Wellington Despatches, xi. 307. The Germans, on the other hand, in 1870 appointed officials, at least in Alsace and Lorraine, in every department of the administration and of every rank. Calvo, § 1896. See also the French Manuel à l'Usage, &c. p. 98.

his prejudice[1]; but he cannot demand that they shall exercise their functions in his name[2]. The former requirement is merely a precaution which it is reasonable for him to take in the interests of his own safety; the latter would imply a claim to the possession of rights of sovereignty, and would therefore not be justified by the position which he legally holds within the occupied territory.

Use of the resources of the country.

Under the general right of control which is granted to an invader for the purposes of his war he has obviously the right of preventing his enemy from using the resources of the occupied territory. He therefore intercepts the produce of the taxes, of duties[3], and other assistance in money, he closes commercial access so as to blockade that portion of the territory which is conterminous with the occupied part, and forbids the inhabitants of the latter, under such penalties as may be necessary, from joining the armies of their country[4].

[1] American Instruct., art. 26; Bluntschli, § 551. The following was the oath taken in 1806 by the Prussian officials who continued to exercise their functions during the French occupation: 'I swear to exercise with fidelity the authority which is committed to me by the Emperor of the French, and to act only for the maintenance of the public tranquillity, and to concur with all my power in the execution of all the measures which may be ordered for the service of the French army, and to hold no correspondence with its enemies.' Alison, Hist. of Europe, v. 855.

[2] Calvo, § 1891. In 1870 this rule was infringed by the German authorities in France, who after the fall of the Emperor Napoleon ordered the Courts at Nancy to administer justice in the name of the 'High German Powers occupying Alsace, Lorraine, &c.,' alleging that the formula 'in the name of the French people and government,' which was actually in use, implied a recognition of the republic. The situation was no doubt embarrassing, as Prussia was at that time unwilling to negotiate with any but the Imperial government; but there can be equally little doubt that the manner in which the difficulty was met was eminently improper. Few will probably be found to dispute the common sense of the remark of M. Bluntschli, who says (§ 547) that 'la solution la plus naturelle aurait été ou bien une formule neutre, par exemple: "au nom de la loi," ou la suppression de la formule elle-même, dont l'utilité est fort contestable.' The courts refused to obey, and suspended their sittings. For documents connected with the occurrence, see Calvo, § 1896. The French Manuel à l'Usage, &c. (p. 100) prescribes that magistrates shall be allowed to administer justice in the name of the legitimate sovereign.

[3] Foreigners paying duties to an invader are of course not liable to pay them a second time when he is expelled or withdrawn.

[4] During the Franco-German War, if persons subject to conscription

Under the same general right he may apply the resources of the country to his own objects. He may compel the inhabitants to supply him with food, he may demand the use of their horses, carts, boats, rolling stock on railways, and other means of transport, he may oblige them to give their personal services in matters which do not involve military action against their sovereign.

according to French law, and inhabiting occupied territory not comprised within the governor-generalship of Alsace-Lorraine, left their place of residence clandestinely, or without sufficient motive, their relatives were fined 50 francs for each day of absence (Ordonnance of 27th Oct., 1870, D'Angeberg, No. 684). Within Alsace-Lorraine a decree ordered (art. 1) that 'celui qui se joint aux forces militaires françaises est puni par la confiscation de sa fortune présente et future et par un bannissement de dix ans. (Art. 5.) Celui qui veut s'éloigner du siège de son domicile, doit en demander, après justification préalable de motif, l'autorisation par écrit au préfet. De celui qui s'est éloigné, sans cette autorisation, plus longtemps que huit jours de son domicile, on suppose en droit qu'il est allé rejoindre les forces françaises. Cette supposition suffit pour la condamnation.' (D'Angeberg. No. 875.) Commenting upon the latter order M. Bluntschli says (§ 540) that 'au sujet des peines de la confiscation et du bannissement prononcées contre les contrevenants des doutes graves peuvent être soulevés, d'une part, parce que ces peines paraissent d'une rigueur excessive, et ensuite parce que leurs effets ont une durée plus considérable que les intérêts militaires ne l'exigent.' M. Rolin Jaequemyns thinks (Second Essai, p. 34) 'qu'il n'est pas contraire au droit d'exiger des habitants que, pour s'absenter, ils se munissent d'un permis spécial, et de considérer comme suspects ceux qui, étant en âge de porter les armes, voyagent sans ce permis.' But, 'nous ne pouvons que trouver exorbitants les moyens indiqués par le décret. La peine odieuse par elle-même de la confiscation générale de tous biens présents et futurs devient plus odieuse encore lorsqu'elle s'applique à un acte qui dans l'opinion de ses auteurs a dû passer non seulement pour légitime, mais pour obligatoire. . . . On peut comparer l'individu qui a réussi à s'échapper sans permis à un vaisseau . . . qui violerait un blocus. Une fois l'obstacle franchi, c'est à l'état dont la vigilance a été en défaut à en subir les conséquences. . . . Tout ce que l'on pourrait admettre c'est que, jusqu'au retour de la personne absente sans permis, l'état envahissant mit ses biens sous séquestre provisoire.' It may be answered to the above criticisms that the rights of punishment possessed by an invader being entirely independent of the legitimateness of the action for which its punishment is inflicted, it is immaterial whether the individual is acting rightly or wrongly; the sole point to consider is whether a certain amount of rigour is necessary to attain an end, and whether that end is important enough to justify rigour. It is clear that emigration to join a national army is in itself as hostile an act as others which a belligerent is authorised to repress with severity, and that if carried on largely over a considerable area it would be highly dangerous to him. It is hard therefore to say that if milder means are first tried, any

But the right to take a thing does not necessarily involve the right to take it without payment, and the right of an invader is a bare one; so long therefore as he confines himself within the limits defined by his right of control he can merely compel the render of things or services on payment in cash or by an acknowledgment of indebtedness which he is himself bound to honour. If he either makes no such payment or gives receipts, the value represented by which he leaves to the sovereign of the occupied territory to pay at the end of the war, he oversteps these limits, and seizes private property under his general right of appropriation [1].

Legal relation of an enemy to the government and people of an occupied territory.

It has been already mentioned that belligerents have commonly assumed, and that some writers still maintain, that it is the duty of the inhabitants of an occupied country to obey the occupying sovereign, and that the fact of occupation deprives the legitimate sovereign of his authority. It has been shown however, upon the assumption that the rights of an occupant are founded only on military necessity, that this view of the relation between the invader and the invaded population, and between the latter and their government, is unsound. The invader succeeds in a military operation, in order to reap the fruits of which he exercises control within the area affected; but the right to do this can no more imply a correlative duty of obedience than the right to attack and destroy an enemy obliges the latter to acquiesce in his own

ultimate harshness is too great. In the particular case the Alsace-Lorraine decree was not issued till December; it strikes no one but the emigrant himself; and 12,000 men had already escaped to join the French army (Circular of Count Chaudordy, D'Angeberg, No. 1024); under all the circumstances therefore it possibly was not too severe. The earlier decree affecting the other occupied provinces is far more open to criticism. Vicarious punishment never commends itself by its justice, and recourse should only be had to it in the last extremity. M. Bluntschli's objection that the effects of a punishment ought not to have a greater duration than the state of military affairs which renders it necessary is sound. The termination of war ought to put an end to all punishments which are still in progress.

[1] See antea, p. 423. The distinction must be kept in mind, belligerent governments and some writers being anxious to represent seizure without payment for military purposes as an act of sovereignty and not of military violence.

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destruction. The legal and moral relation therefore of an enemy to the government and people of an occupied territory are not changed by the fact of occupation. He has gained certain rights; but side by side with these the rights of the legitimate sovereign remain intact. The latter may forbid his officials to serve the invader, he may order his subjects to refuse obedience, or he may excite insurrections [1]. So also the inhabitants of the occupied territory preserve full liberty of action. Apart from an express order from their own government they are not called upon to resist the invader, or to neglect such commands as do not imply a renunciation of their allegiance; but on the other hand they may rise against him at any moment, on the full understanding that they do so at their own peril.

Duties of an occupant.

Though the fact of occupation imposes no duties upon the inhabitants of the occupied territory the invader himself is not left equally free. As it is a consequence of his acts that the regular government of the country is suspended, he is bound to take whatever means are required for the security of public order [2]; and as his presence, so long as it is based upon occupation, is confessedly temporary, and his rights of control spring only from

[1] Bluntschli (§ 541) justly says that when the government of an invaded territory withdraws its functionaries, and even its police, as was done by Austria in 1866, the enemy suffers much less than the inhabitants. The ordinary life of the country is paralysed, but the invader will find the means of doing whatever is necessary for his own convenience. If however the doctrine stated in the text is well founded, M. Bluntschli is wrong in declaring (§ 540) that the French government overstepped the limits of its rights in December 1870, when it forbade the people in Lorraine under pain of death to work for the German forest administration. It was only guilty of forcing them to choose between the alternative of immediate punishment by the Germans, and of possible future punishment, with the brand of unpatriotism added, from the courts of their own nation. Such acts are generally unwise and even cruel, but they are none the less clearly within the rights of a government.

[2] The costs of administration are defrayed out of the produce of the regular taxes, customs, &c. of the country, which the invader is authorised to levy for this purpose. These costs must be satisfied before he exercises his right to appropriate the taxes, &c. to his own profit. Comp. American Instruct., art. 39; Project of Declaration of Brussels, art. 5; Bluntschli, § 647; [art. 48 of the Hague Convention].

the necessity of the case, he is also bound, over and above the limitations before stated[1], to alter or override the existing laws as little as possible, whether he is acting in his own or the general interest. As moreover his rights belong to him only that he may bring his war to a successful issue, it is his duty not to do acts which injure individuals, without facilitating his operations, or putting a stress upon his antagonist. Thus though he may make use of or destroy both public and private property for any object connected with the war, he must not commit wanton damage, and he is even bound to protect public buildings, works of art, libraries, and museums[2].

When occupation begins and ceases.

The consequences of occupation being so serious as they in fact are to the inhabitants of an occupied territory, it becomes important to determine as accurately as possible at what moment it begins and ends in a given spot. Up to a certain point there can be no doubt. Within the outposts of an army and along its lines of communication, so long as they are kept open, the exclusive power of the invader is an obvious fact. But in the territory along the flank and in advance of the area thus defined it is an unsettled question under what conditions occupations can exist. According to one view it is complete throughout the whole of a district forming an administrative unit so soon as notice of occupation has been given by placard or otherwise at any spot within it, unless military resistance on the part of duly organised national troops still continues[3]; when occupation is once established it does not cease by the absence of the invading force, so that flying columns on simply passing through a place can render the inhabitants liable to penalties for disobedience to orders issued subsequently when no means of enforcing them exists, or for

[1] These duties are clearly stated in arts. 2 and 3 of the Project of Declaration of Brussels. See also the Manual of the Institute of Int. Law, arts. 42-9.

[2] [See Hague Convention, art. 56.]

[3] The administrative unit adopted by the Germans in 1870 as that, the whole of which was affected by notice of occupation given at any spot within it, was the canton. The average size of a French canton is about 72 square miles.

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resistance offered at any later time to bodies of men in themselves insufficient to subdue such resistance; although also occupation comes to an end if the invader is expelled by the regular army of the country, it is not extinguished by a temporary dispossession, effected by a popular movement, even if the national government has been reinstated. This doctrine may be gathered from the recent German practice, and from that of Napoleon in the early years of last century; it is therefore that which has been acted upon in most modern wars in which occupation has taken place upon a large scale[1]. No distinct usage of a more moderate kind can, on the other hand, be said to have formed itself; though

[1] M. Bluntschli's language (§ 544) expresses the above view, except that he would seem to exclude occupation by flying columns: 'La prise de possession du territoire ne cesse pas par le simple fait du départ des troupes d'occupation. Lorsqu'une armée pénètre sur le territoire ennemi, elle conserve la possession de la partie du territoire situé derrière elle, même lorsqu'elle n'y a pas laissé de soldats, et cela tant qu'elle ne renonce pas intentionnellement à sa possession ou qu'elle n'est pas dépossédée par l'ennemi.' See Gen. Von Voigts Rhetz on flying columns and temporarily successful insurrections, Parl. Papers, Miscell. i. 1875, p. 65; art. 1 of the German Arrêté of 1870, quoted above, p. 473. A good example of the manner in which the Germans maintained occupation during the French War without the support of present or neighbouring force is afforded by their occupation of the country lying between Paris, Amiens, and the sea. 'I once travelled,' says Mr. Sutherland Edwards, 'from St. Germain to Louviers, a distance of fifty miles along a road occupied theoretically by the Prussians, without seeing a Prussian soldier. From the outskirts of Rouen to Dieppe, nearly fifty miles, I met here and there, and at one place found a post of perhaps half-a-dozen men. At Dieppe, Prussian proclamations on the walls and the local cannons spiked or otherwise spoiled; the police and firemen disarmed; the telegraph in every direction cut, the postal service stopped; but nowhere a Prussian or a German soldier. From Dieppe to Neufchâtel, not a soldier, with the exception of a few invalids kept in Neufchâtel in hospital; from Neufchâtel to the advanced posts of the army at Amiens, again not a soldier. Yet from St. Germain, by way of Louviers and Elbœuf to Rouen, from Rouen to Dieppe, from Dieppe to Amiens, the roads and adjacent districts were all under Prussian rule.' (The Germans in France.) The practice of Napoleon with respect to flying columns may be indicated by an order issued in 1806 to Marshal Lannes when the French army had not yet passed the Oder: 'Mon intention est que vous réunissiez toute votre cavallerie légère au delà de l'Oder, et qu'elle batte tout le pays jusqu'à la Vistule. Vous donnerez pour instructions aux commandants de défendre aux recrues d'aller rejoindre, conformément à l'appel que leur fait en ce moment le roi de Prusse, et de faire connaître partout que le premier village qui laissera partir ses recrues sera puni.' Corresp. xiii. 467.

there are indications of the growth of an opinion hostile to the current practice. The discussions which took place at the Conference of Brussels resulted in the introduction of a new article into the Project of Declaration for the purpose of defining the conditions under which territory should be considered to be occupied. By this, occupation was said to 'extend only to territories where the authority of the enemy's army is established and is capable of being exercised,' and it is evident from the Protocols that capacity to exercise authority was understood to depend upon the existence of an immediately available force[1]. The language of the article is wanting in precision, and if it were received without amendment as the standard of law, Lord Derby would be justified in entertaining the fear which he has expressed, that 'the inhabitants of an invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy[2].' Defective however as it is, and notwithstanding that it represents little more than an endeavour to find out a common ground upon which conflicting opinions might momentarily unite, distinct gain would have accrued from the acceptance of any definition, however imperfect, which is more in harmony with the true basis of the law of occupation than that to which great military states have hitherto been in the habit of giving effect. The principle that occupation, in order to confer rights, must be effective, when once stated, is too plainly in accordance with common sense, and too strictly follows the law already established in the analogous case of

[1] The delegates of Sweden and Switzerland directed attention to the close analogy which exists between occupation and a blockade (Parl. Papers, Miscell. i. 1875, p. 64). The right of blockade which, like occupation, is based solely upon the military necessities of a belligerent, gives him certain rights within limits of place which are defined by his immediately effective force. See postea, part iv. chap. vi. The principle of the article was approved of by a considerable number of jurists at a meeting of the Institute of International Law in 1875. See also Rolin Jaequemyns, Second Essai, p. 34.

[2] Parl. Papers, Miscell., No. ii. 1875, p. 5.

blockade, to remain unfruitful, and there can be little doubt that practice will in time be modified so as to conform within reasonable bounds to the deductions which may logically be drawn from it. [The principle of the Brussels article has now been adopted by the Hague Convention of 1899 [1].]

That the more violent usage is theoretically indefensible scarcely requires proof. Rights which are founded upon mere force reach their natural limit at the point where force ceases to be efficient. They disappear with it; they reappear with it; and in the interval they are non-existent. If moreover neither the legitimate sovereign of a territory nor an invader holds a territory as against the other by the actual presence of force, so that in this respect they are equal, the presumption must be that the authority of the legitimate owner continues to the exclusion of such rights as the invader acquires by force. As a matter of fact, except in a few cases which stand aside from the common instances of extension of the rights of occupation over a district, of which part only has been touched by the occupying troops, the enforcement of those rights through a time when no troops are within such distance as to exercise actual control, and still more the employment of inadequate forces, constitute a system of terrorism, grounded upon no principle, and only capable of being maintained because an occupying army does not scruple to threaten and to inflict penalties which no government can impose upon its own subjects.

If it were settled that occupation should be considered to exist only together with the power of immediate enforcement of the rights attendant on it, occupation by flying columns, and occupation evidenced by the presence of a plainly inadequate force, would disappear; and with them would disappear the abuses which are now patent. To insist without reservation upon the requirement of present force would not however be altogether

[1] [Art. 42. Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.]

just to the invader. It must be admitted that the country which is covered by the front of an army, although much of it may not be strongly held, and though it may in part be occupied only by the presence of a few officials, is as a rule far more effectually under command than territory beyond those limits, even when held by considerable detachments. This is so much the case that in such districts a presumption in favour of efficient control may be said to exist which the occurrence of a raid by national troops, the momentary success of an insurrection, or the presence of guerilla bands, is not enough to destroy. An invader may therefore fairly demand to be allowed to retain his rights of punishment, within the district indicated, until the enemy can offer proofs of success, solid enough to justify his assertion that the occupier is dispossessed. This requirement might probably be satisfied, and at the same time sufficient freedom of action might be secured to the invaded nation by considering that a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot; or so long as it covers it, unless the operations of the national or an allied army or local insurrection have re-established the public exercise of the legitimate sovereign authority.

CHAPTER V

POSTLIMINIUM

PART III
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In what postliminium consists.

WHEN territory which has been occupied and population which has been controlled by an enemy comes again into the power of its own state during the progress of a war, or when a state the whole of which has been temporarily subjugated throws off the yoke which has been placed upon it before a settled conquest has been clearly effected, or finally when a state or portion of a state is freed from foreign domination by the action of an ally before a conquest of it has been consolidated, the legal state of things existing prior to the hostile occupation is re-established. In like manner, when property of any of the kinds which have been mentioned as being susceptible of appropriation during the course of hostilities is captured by an enemy, and is then recaptured by the state to which it belongs or of which the person to whom it belongs is a subject, or by an ally, before the moment at which it so becomes the property of its captor that third parties can receive a transfer of it, the owner is replaced in legal possession of it. In all these cases the legal state of things existing before the hostile occupation or capture is conceived of for many purposes as having been in continuous existence [1].

The above rule is based upon what is called, by an unnecessarily imposing name, the right of postliminium, from a somewhat distant analogy to the *jus postliminii* of the Roman law. Properly it is difficult to see that the so-called right has any ground for claiming existence as such. Hostile occupation of territory being merely the detention of property belonging to

[1] Grotius, De Jure Belli et Pacis, lib. iii. c. ix; Vattel, liv. iii. ch. xiv; De Martens, Précis, § 283; Phillimore, iii. §§ cccciii–vi; Bluntschli, §§ 727–8, 736. Grotius, followed by Vattel and some more modern writers, supposes postliminium not to extend to moveables.

another, the control exercised over its inhabitants being the mere offspring of military necessity, and appropriation by conquest, in those cases in which the intention to conquer is present, being incomplete during the continuance of war, the rights of the original state person, where the life of the state is momentarily suspended, or of the legal owner, where a portion of its territory is cut off, remain untouched. The state is simply deprived temporarily of the means of giving effect to those rights; and when the cause of the deprivation is taken away, it is not a right, but the fact of power which revives. In the case therefore of territory recovered after hostile occupation the right of postliminium is merely a kind of substantive dress which is given to the negative fact that a legitimate owner is under no obligation to recognise as a source of rights the disorder which is brought into his household by an intruder; and though the case of property susceptible of appropriation during war is not identical, since the right of the enemy to deal with it as his own arises immediately that effectual seizure is made, it is rendered closely analogous by the fact that evidence of effectual seizure is only considered to be sufficient to bind the other belligerent, or to warrant recognition by neutrals, after the captured object has been taken into a safe place. In effect, the doctrine of postliminium amounts to the truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law. PART III CHAP. V

Putting aside certain of the effects of postliminium, which are mentioned by writers, but with which international law is not concerned, such as its effect in reviving the constitution of the state, there seem to be only four subjects connected with it which need to be touched upon—viz.

1. Certain limitations to the operation of the right in the case of occupied territory.
2. The effect of acts done by an invader in excess of his rights.

3. The effect of the expulsion of an invader by a power not in alliance with the occupied state.
4. Special usages with regard to property recaptured at sea.

Limitations upon the operation of postliminium in the case of occupied territory.

As a general rule the right of postliminium goes no further than to revive the exercise of rights from the moment at which it comes into operation. It does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion; and as between the state and individuals the evil would be scarcely less,—it would be hard for example that payments of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government. Political acts on the other hand fall through as of course, whether they introduce any positive change into the organisation of the country, or whether they only suspend the working of that already in existence. The execution also of punitive sentences ceases as of course when they have had reference to acts not criminal by the municipal law of the state, such for example as acts directed against the security or control of the invader. Again, while acts done by an invader in pursuance of his rights of administrative control and of enjoyment of the resources of the state cannot be nullified in so far as they have produced their effects during his occupation, they become inoperative from the moment that the legitimate government is restored. Thus—to recur to a case which has already been glanced at in a slightly different aspect—in 1870–1 certain persons entered into contracts with

the German government for felling timber in state forests in France. They were paid in advance, and the stipulated fellings not having been finished at the time of the signature of the treaty of peace between the two countries, the contractors urged that as the German government was within its rights in causing the fellings to be made, the French government was bound to allow them to be completed. The French government held that the re-establishment of its own control had *ipso facto* nullified the contracts, and on the occasion of the signature of the supplementary convention of December 11, 1871, it made a declaration to that effect, which was accepted by the German government as correct in point of law. That French authority was re-established in the particular case by a treaty of peace is unimportant, the effects of re-establishment by treaty and in other ways being in such matters confessedly identical[1].

Effects of acts done by an invader in excess of his rights.

When an invader exceeds his legal powers, when for example he alienates the domains of the state or the landed property of the sovereign, his acts are null as against the legitimate government. Such acts are usually done by an invader who intends to effect a conquest, and supposes himself to have succeeded. Whether therefore they are valid or invalid in a given instance depends solely upon the strength of the evidence for and against his success.

Effect of expulsion of an invader by a power not in alliance with the occupied state.

Some difference of opinion exists as to the effect of the expulsion of an invader by a power not in alliance with the occupied state. As the annexation of Genoa to Sardinia in 1815 forms the leading case upon the subject, and is that to which all arguments have reference, it may be as well to begin by stating it. In the spring of 1814 Lord William Bentinck landed on the coast of Tuscany with a small Anglo-Sicilian force, and learning that the city of Genoa was inadequately garrisoned, determined to attempt its capture. The results of a couple of days' fighting induced the commandant to capitulate. The place was surrendered; the garrison retired under the terms of

Case of Genoa in 1815.

[1] Heffter, § 188; Bluntschli, § 731; Calvo, § 2990.

the capitulation to Nice; and the whole territory of the former republic fell into the hands of England, by conquest as between itself and France. The Genoese state had been destroyed in 1797, but the British government, in making the treaty of Amiens, had refused to acknowledge its destruction, and its formal union with France in 1805 had remained equally unrecognised. On the expulsion of the French a local republican government was set up with the sanction, and indeed at the suggestion, of Lord William Bentinck; but ultimately the city with its attendant territory was annexed to Sardinia, against the wishes of the inhabitants, in consequence of the general territorial redistribution which was made at the Congress of Vienna. Considerable feeling was excited in England by the latter occurrence, and resolutions condemnatory of it were moved in the House of Commons by Sir James Mackintosh. In the course of his speech in support of them he argued that 'in the year 1797, when Genoa was conquered by France, then at war with England, under pretence of being revolutionised, the Genoese republic was at peace with Great Britain; and consequently, in the language of the law of nations, they were friendly states. Neither the substantial conquest in 1797, nor the formal union of 1805, had ever been recognised by this kingdom. When the British commander therefore entered the Genoese territory in 1814, he entered the territory of a friend in the possession of an enemy. Can it be inferred that he conquered it from the Genoese people? We had rights of conquest against the French; but what right of conquest would accrue from their expulsion as against the Genoese? How could we be at war with the Genoese?—not as with the ancient republic of Genoa, which fell when in a state of amity with us,—not as subjects of France, because we had never legally and formally acknowledged their subjection to that power. There could be no right of conquest against them, because there was neither the state of war, nor the right of war. Perhaps the powers of the continent, which had either expressly or tacitly

recognised the annexation of Genoa in their treaties with France, might consistently treat the Genoese people as mere French subjects, and consequently the Genoese territory as a French province, conquered from the French government, which as regarded them had become the sovereign of Genoa. But England stood in no such position:—in her eye the republic of Genoa still of right subsisted. Genoa ought to have been regarded by England as a friendly state, oppressed for a time by the common enemy, and entitled to reassume the exercise of her sovereign rights as soon as that enemy was driven from her territory by a friendly force[1].'

The views of Sir James Mackintosh have very commonly been regarded as sound[2], but they are not admitted by all writers. Heffter supposes, in agreement with the line of conduct pursued by England, that a state freed by the exertions of a power which is not its ally does not recover its existence as of course; and M. Bluntschli argues that though the liberating power cannot dispose of the country wholly without reference to the wishes of the population, yet that a state which is neither able to defend itself in the first instance nor to re-establish itself afterwards cannot be held to possess a clear and solid right to existence, and at the same time the liberating power has a right to be rewarded for its sacrifices, which indeed cannot be supposed to have been made in a spirit of pure disinterestedness;—in settling the future of the liberated country the interests and wishes both of it and of its liberator ought, he thinks, to be taken into consideration[3].

[1] Hansard, xxx. 387 and 891, or Mackintosh's Miscell. Works, p. 703; Alison's Hist. of Europe, x. 209 and 295.

[2] Phillimore, iii. § cxxiii; Halleck, ii. 520–1; Calvo, § 2986. The same view had already been taken by Vattel, liv. iii. ch. xiv. § 213.

[3] Heffter, § 188 and § 184[a]; Bluntschli, § 729. Woolsey (§ 153) follows Heffter.

Perhaps the value of M. Bluntschli's opinion is somewhat affected by the fact that he instances 'les négociations entre la Prusse et le duc Frédéric d'Augustenbourg, au sujet des duchés de Schleswig et de Holstein, 1865–6, après que ces duchés eurent été affranchis par la Prusse de la domination danoise' as an example of the right course of conduct to adopt. But it is not quite clear how the case is an example at all of the class of cases under consideration.

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Conclusions.

It may probably be safely concluded that the opinions of Sir James Mackintosh and his followers on the one hand and of MM. Heffter and Bluntschli on the other both contain elements of truth. As a matter of common sense, there can be no question that conquest cannot be held to be consolidated while a war continues which by any reasonable chance may extend to the conquered territory, and that a country which has been independent must be supposed to retain its existence in law as between itself and a foreign state so long as the latter has not recognised that conquest has taken place. The foreign state cannot at the same moment deny proprietary rights to the intruder, and arrogate rights to itself which can only be derived from the enemy character of the country which has been temporarily or permanently subjugated. Nor does the fact that it has made sacrifices in ejecting the invader from the invaded territory alter its legal position, whether the sacrifices have been made disinterestedly or not. It was not obliged to make them. On the other hand it cannot be placed in a worse position by being at war with the intrusive state than it would otherwise have held. The legal effects of a war are not modified by the fact that one of the parties to it is waging another wholly distinct war at the same time. If therefore a conquest seems, either from the attitude taken up by the conquered population towards the victor, or from his apparent solidity of possession, to be so settled that a state would be justified if at peace with him in recognising it as definitive, there can be no reason for denying to an enemy the right of making up its own mind whether occupation continues or conquest has taken place;—he is merely prevented by the nature of the relation existing between him and the invader from showing what opinion he has formed until the course of his war leads him to attack the territory in question.

In all cases then in which conquest has unquestionably not been consolidated, and in which the territory of a state is therefore only occupied, the state recovers its existence and all the rights attendant on it as of course so soon as it is relieved

from the presence of the invader. Where, on the other hand, there is reasonable doubt as to whether a state is occupied or conquered, the third state must be allowed to determine the point for itself, and to act accordingly[1].

Recapture.

The circumstance that commercial vessels and their cargoes belong to private owners and that they are generally of more or less considerable value, coupled with the fact that recaptors are generally fellow-subjects of the original owners of recaptured property, has led to the adoption of certain usages with respect to maritime recapture by which the application of the right of postliminium is somewhat blurred. On the one hand, it has been thought well to reward recaptors by paying them salvage in all cases, so that property never returns unconditionally to the owner; on the other, property is as a rule returned to him upon payment of salvage, notwithstanding that the enemy may have evidenced his capture by taking the captured ship into a safe place, or even by formal condemnation in his courts.

In 1632 the Dutch government, in the interests of commerce, issued a placard directing restitution to the owners of vessels recaptured before being taken into an enemy's port, and by a decree of 1666 they regarded property in them as unchanged until after sale and a fresh voyage to a neutral port. In 1649 England ordered restitution of all British vessels to the owners on payment of salvage irrespectively of time or of the manner in which they had been dealt with by the enemy; and the practice has been continued by successive Prize Acts to the present time, an exception only being made in the case of ships which before recapture have been commissioned by the enemy as vessels of war[2]. Gradually a like mode of dealing with recaptured ships

[1] Of course where the ejecting state appears ostensibly in the character of a liberator it is bound by its own professions. In the case of Genoa, for example, it may be a question whether England by the general attitude which she assumed towards the Italian populations did not morally bind herself to restore such of them as might wish it to the position which they occupied before the French conquest.

[2] Bynkershoek, Quæst. Jur. Pub. l. i. c. iv; Nostra Signora del Rosario,

has been adopted by other nations, and the municipal laws of the United States, Portugal, Denmark, Sweden, Holland, France and Spain now direct their restitution. The cases in which restitution is made, and the conditions of restitution, are not however altogether similar in these various countries. The United States restores only when the recapture has been effected before condemnation in a prize court; France restores vessels retaken by a public ship of war after twenty-four hours' possession by an enemy, but leaves them as prizes in the hands of a privateer; Spain gives greater indulgence to neutrals than to her own subjects and returns recaptured vessels to the former, unless they are laden with enemy's property; Portugal, Denmark, Sweden, and Holland follow the English practice of making restitution in all cases. Payment of salvage is always required, but the amount varies in different countries. In France one tenth of the value is exacted, unless recapture has taken place before the expiration of twenty-four hours, when one thirtieth only is demanded; in England the amount given is one eighth, except in cases of special difficulty and danger; in Spain the rate is one eighth if the recapture has been effected by a public ship of war, and one sixth if a privateer is the recaptor; in Portugal the corresponding rates are one eighth and one fifth respectively; in Denmark one third and in Sweden one half is demanded; the normal rate in the United States is one eighth of the value, but other rates are levied in special cases[1]. In the majority of instances the above regulations have been made for municipal purposes, but it is usual to extend the same treatment to allies and friends as is applied by the recapturing state to its

iii Rob. 10; L'Actif, Edwardes, 185; The Ceylon, i Dodson, 118–9; 27 and 28 Vict. c. 25.

[1] 27 and 28 Vict. c. 25; Twiss, ii. §§ 174–5; Wheaton, Elem. pt. iv. ch. ii. § 12; Pistoye et Duverdy, ii. 105; Negrin, p. 288. As between England and France the treatment to be applied is still dictated by a treaty of 1786; if an enemy has taken a vessel which is recaptured after less than twenty-four hours' possession it is restored to its owner on payment of a third of its value; if it is recaptured after more than twenty-four hours' possession it belongs to the recaptors. Pistoye et Duverdy, ii. 109.

own subjects, provided the allied or friendly government acts upon the principle of reciprocity; if it give effect to a less liberal rule, its own practice is followed [1]. PART III CHAP. V

[1] The Santa Cruz, i Rob. 60. In the United States it is provided by Act of Congress that when a practice is known to exist in a foreign country with respect to vessels of the United States, such practice is to be observed with respect to vessels of that country, except that they are not to be returned if they have been condemned in a prize court; where no such practice is known the rules applicable to subjects of the United States are to be followed. Wheaton, Elem. pt. iv. ch. ii. § 12; The Schooner Adeline, ix Cranch, 288.

CHAPTER VI

ENEMY CHARACTER

PART III
CHAP. VI
Persons and property affected with an enemy character, other than subjects and property of an enemy state.

INDIVIDUALS being identified with the state to which they belong, and it being, besides, a special principle of the laws of war that the subjects of a state are the enemies of its enemy, it might *primâ facie* be expected that the whole of the subjects of a state would in all cases be the enemies of a state at war with it. On the other hand, it might also be expected that the subjects of a state at peace with both parties could in no case be looked upon as the enemies of either. The bare legal fact however that a person is or is not the subject of a state is of less practical importance in war than the consideration that he does or does not render assistance directly or indirectly to the enemy. It was seen in the chapter on the general principles of the law as between belligerents and neutrals that the former are allowed in certain cases to restrain neutral individuals from trade with the enemy, and to impose penalties for a breach of their rules. Where the association of the neutral person with the enemy is closer; where the assistance is given, not accidentally, but because the neutral person has chosen to identify himself with the enemy by taking service in the country or by establishing himself in it, it is natural that a belligerent should be permitted to go further, and to regard the neutral individual as himself hostile, at least to the extent that his acts are of advantage to the enemy, or that he presents himself as a member *de facto* of the enemy community. On the other hand, when the subject of a belligerent state has established himself in a neutral country, the closeness with which a person is identified with the place where he finds a home operates to free him, in so far as he is associated with it rather than with his own country, from the consequences of his belli-

gerent character; to seize his ships or his goods would be to put a stress, not upon the enemy, but upon the neutral state. With these reasons of a merely practical nature the effects of sovereignty, or in other words, of the authority which a state exercises over foreigners within its territory, combine to prevent the attribution of enemy character from corresponding exactly with the fact of national character. A foreigner living and established within the territory of a state is to a large extent under its control; he cannot be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the state, it may reasonably be treated as hostile by an enemy. Conversely, when the foreigner lives in a neutral country, he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his state, and it is responsible for his acts, if he does them. For the purposes of the war therefore he is in reality a subject of the neutral state. Finally, if property be regarded separately, although on the one hand it cannot escape from the consequences of enemy ownership, it may on the other be necessarily hostile by its origin irrespectively of a neutral national character of its owner, and it is also capable of being so used in the service of a belligerent as to fall completely under his control, and to become his for every purpose of his hostilities.

Enemy character may thus attach either to persons of neutral national character and to their property as attendant on them, or to property owned by neutrals in virtue of its origin or of the use to which it is applied.

Effect of domicil.

The chief test of the existence of such an identification of a neutral subject with an enemy state as will suffice to clothe him with an enemy character is supplied by the fact of domicil.

What constitutes domicil

For belligerent purposes a person may be said to be domiciled in a country when he lives there under circumstances which give

PART III CHAP. VI for belligerent purposes.

rise to a reasonable presumption that he intends to make it his sole or principal place of residence during an unlimited time. The circumstances upon which such a presumption can be founded are the two, which may be united in infinitely varying proportions, of the past duration and the object of residence. If a person goes to a country with the intention of setting up in business he acquires a domicil as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently; if on the other hand he goes for a purpose of a transitory nature, he does not necessarily acquire a domicil, even though he lingers in the country after his immediate object is satisfied; he only does so if at last by the length of his residence he displaces the presumption of merely temporary sojourn which is supplied by his original purpose[1]. Of these two elements of time and object, time is nevertheless the more important ultimately. Lord Stowell said with regard to it that 'of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects, in most cases it is unavoidably conclusive. . . . I cannot but think that against a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case that other purposes forced themselves upon' the person living in a foreign state 'and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war, it is cer-

[1] The first of these examples may be illustrated by the case of Mr. Whitehill, who 'arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned.' (Referred to in The Diana, v Rob. 60.) The two latter are covered by the language of Lord Stowell in the case of The Harmony, quoted in the text.

Foreign writers generally devote little attention to questions of enemy character. English and American writers merely reflect the doctrines laid down in the decisions rendered by the courts in the two states; it is not therefore usually necessary to refer to them.

tainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself, but if he continues to reside during a good part of the war, contributing by payment of taxes or other means to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a time there must be. In proof of the efficacy of mere time it is not impertinent to remark that the same quantity of business which would not fix a domicil in a certain space of time would nevertheless have that effect, if distributed over a larger space of time. Suppose an American came to Europe with six contemporary cargoes of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time; be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicil [1].'

Change of domicil during war.

As domicil is acquired for private purposes of business or pleasure, and the consequences to a man of its possession by him flow, not from an attitude of hostility on his part, but from the accidental circumstance that his conduct is of advantage to a belligerent, he is not tied down to the domicil in which he is found at the beginning of war. So soon as he actually removes elsewhere, or takes steps to effect a removal in good faith and without intention to return, he severs his connexion with the belligerent country. He thus recovers his friendly character, and with it

[1] The Harmony, ii Rob. 322.

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recovers also the rights of a friend. In 1783, for example, a Mr. Johnson, an American subject, came to England to trade, and by staying there till 1797 acquired an English domicil. Some time before the latter year he had formed an intention of leaving, and during its course he actually left. Before his departure however a vessel belonging to him, which he had sent out in order that she should be freighted for America, but which an agent, supposing that Mr. Johnson would have reached the United States before the completion of the voyage, had sent to ports enemy of England and then back to the latter country, was detained there. It was held that as 'the national character of Mr. Johnson as a British merchant was founded on residence only, as it was acquired by residence, and rested on that circumstance alone, he was in the act of resuming his original character, and is to be considered as an American, from the moment he turns his back on the country where he has resided on his way to his own country; the character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*[1].'

House of trade.

A person though not resident in a country may be so associated with it through having, or being a partner in, a house of trade there, as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory; if he is a merchant in two countries, of which one is neutral and the other belligerent, he is regarded as neutral or belligerent according to the country in which a particular transaction of his commerce has originated. Things are different when a merchant living in a neutral country, and carrying on an ordinary neutral

[1] The Indian Chief, iii Rob. 12. For an application of the principle during the Crimean War under the somewhat delicate circumstances of the sale of a vessel, in view of the outbreak of war, by a Russian father to a son domiciled in England, who afterwards removed to Denmark in order to carry on a neutral trade, see the Baltica, Spinks, 264. For an American decision, see the Venus, viii Cranch, 280. For a case in which the change of domicil was held to be not effected in good faith, see the Ernst Merck, Spinks, 89.

trade has merely a resident agent in the belligerent state, the agent being looked upon as only an instrument for facilitating the conduct of a trade which in other respects is not distinguishable from that of other neutral merchants. If however the trade is in itself such as to create any special association, through the concession of exceptional privileges or otherwise, between the merchant and the belligerent state, the former becomes impressed with a hostile character relatively to enemies of the state, notwithstanding the fact of his absence. Thus an American, possessing a tobacco monopoly in the Caraccas, but not residing in Spanish territory, and conducting his trade through an agent, was held to have contracted a Spanish mercantile character[1]. PART III CHAP. VI

The application of the foregoing rules is not modified in the practice of England and the United States by the fact that a merchant falling under their operation is a consul either for a neutral or a belligerent power. He has the mercantile character of the country in which he is commercially domiciled, and he receives no protection or harm in his private affairs from his official position. If his property is liable to condemnation upon his mercantile character it is condemned; and on the other hand, if he is domiciled in neutral territory, he does not forfeit his neutral character by acting as consul of a belligerent state. The French practice is so far different that the property of a neutral subject, consul for a neutral state in a belligerent country, and carrying on trade in the latter, is held to be itself neutral[2].

Effect of permanent civil or military employment.

When a person belonging to a neutral state takes permanent civil or military service with a foreign state he identifies himself so fully with it that he becomes the enemy of its enemies for every purpose. When he merely contracts to do specific services,

[1] The Jonge Classina, v Rob. 302; The Freundschaft, iv Wheaton, 105; The Anna Catherina, iv Rob. 119; The Portland, iii Rob. 44; Calvo, § 1719.

[2] The Indian Chief, iii Rob. 27; Admiralty Manual of Prize Law (Holland), 1888, p. 11; Le Hardi contre la Voltigeante, Pistoye et Duverdy, i. 321; La Paix, ib.

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he becomes an enemy to the extent, and for the purposes, of those services.

The occasions during the progress of a war upon which a neutral openly holds forth himself or his property as identified with the enemy, or being so identified in fact takes up by resistance a hostile attitude, need no discussion; those in which during the progress of the war it falls to the courts of a belligerent, when the neutral has submitted to capture, to draw inferences from his conduct, will be best treated in another connexion [1]. It is only necessary here to consider a preliminary question raised, not by the character of the acts, but by the moment at which they are done. Can a neutral so identify himself or his property with a possible or intending belligerent before the outbreak of war that hostilities can be opened by an attack upon him or by the capture of his property? In some extreme cases the answer is at once evident. No one would deny that a body of troops raised and officered among a neutral population is as much a part of the army of the state which employs them as are troops native to the country. And there are more temporary services, of which the nature is as little uncertain, that a foreigner can render to a state. If a Belgian vessel, laden with French troops, other vessels laden in like manner being in the neighbourhood, were found near the English coast, and heading for it, the neutral would be unable to pretend that he imagined his service to be pacific; the circumstances indeed might well be such that the captain of a British man of war would be fully justified in opening fire immediately without regard to the Belgian flag. But there are many cases in which the intention of the neutral would be doubtful; there are many in which there would be a presumption in his favour, or a certainty of his innocence. If, for example, he were engaged solitarily in conveying a French force to Martinique it would be possible, it might even be extremely probable, that he should suppose himself to be employed in carrying out an ordinary

[1] See postea, pt. iv. ch. vi.

service of reliefs for the garrison. In such circumstances is he liable to capture? The answer in reality is no less clear. However innocent the intention of the neutral may be, he serves a state which is operating with a view to hostilities, or against which hostilities are about to be undertaken; in either case his action may be gravely prejudicial to the vital interests of the country which is about to be an enemy. It would be futile, it would be unjust, and it would almost be ridiculous, to exact that with vital interests at stake the enemy should look impassively on until an opportunity had occurred of showing the existence of war by collision with the armed forces of his adversary; and the enemy alone can decide whether the interests at stake are serious or not. In effect he must so far have a free hand as to be able to arrest the action which threatens to injure him. He must therefore be permitted to establish the facts by visit and capture if he finds that something is being done important enough to induce him to commence hostilities. From the summons to bring to, and the subsequent visit, the neutral gains full knowledge of the actual state of things; he is no more taken by surprise than he would be if a fleet action, of which he was unaware, had taken place on the previous day. It becomes his duty to allow himself to be brought in; it becomes the duty of the prize court in turn to release the vessel if there be any room whatever for the supposition of innocence. It is scarcely necessary to add that as visit upon the high seas is only permitted during war, and as, consequently, a summons to bring to delivered by a vessel, giving evidence that she is a public vessel of her state, amounts to notice that war exists, the neutral who endeavours to escape or resists throws in his lot actively with the belligerent whom he serves, and exposes himself to be forcibly dealt with[1]. It is equally superfluous to point out that the state which through its agents

[1] [For the application of this principle to the case of the Kowshing, a British vessel sunk by a Japanese cruiser, July 25, 1894, while conveying Chinese troops prior to declaration of war, see Professor Holland, Studies in International Law, p. 126.]

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seizes, or even visits, the neutral vessel does an act from which it cannot recede; it is irretrievably committed to war[1].

How property becomes affected with an enemy character.

Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the state to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized[2].

Property, not impressed with a belligerent character by its origin, and belonging to a neutral, becomes identified with a belligerent by being subjected wholly to his control, or being incorporated into his commerce. Thus, a vessel owned by a neutral, but manned by a belligerent crew, commanded by a belligerent captain, and employed in the trade of a belligerent state, is deemed to be a vessel of the country from which she navigates; and the acceptance of a pass or a licence from a belligerent state, or the fact of sailing under its flag, entails the same consequence[3].

Further questions.

Besides the foregoing points connected with the possibility of the acquisition of an enemy character by neutral persons and things, questions present themselves with regard to—

1. Things originally belonging to an enemy, but sold to a neutral during war, or shortly before its commencement

[1] For the due conduct of a state on commencing hostilities towards neutral states and towards neutrals not engaged in carrying out a military or naval operation for his enemy, see postea, p. 574.

[2] The Phœnix, v Rob. 20; Thirty Hogsheads of Sugar v. Boyle, ix Cranch, 191.

[3] The Vigilantia, i Rob. 13; Admiralty Manual of Prize Law (Holland), 1888, p. 6. The navigation laws of some states are so lax that international conflicts might readily arise out of the above rules. To take an extreme case, in Colombia a vessel owned solely by foreigners, and with a foreign crew, may be registered as Colombian, so that a ship not even owned by a Colombian neutral might endeavour to cover herself with Colombian neutrality while carrying on a purely belligerent trade.

under circumstances admitting of the suspicion of sale in anticipation of war.

2. Goods consigned by neutrals from neutral ports to an enemy consignee, or *vice versâ*.

3. Places belonging to a belligerent which are in the military occupation of his enemy.

4. Places under double or ambiguous sovereignty.

Questions with regard to things sold by an enemy during war.

As a general rule a neutral has a right to carry on such trade as he may choose with a belligerent. But the usages of war imply the assumption that the exercise of this right is subjected to the condition that the trade of the neutral shall not be such as to help the belligerent in prosecuting his own operations, or in escaping from the effects of those of his enemy. When neutral commerce produces this result the belligerent who suffers from the trade is allowed to put it under such restraint as may be necessary to secure his freedom of action. Hence, as private property is liable to capture at sea, and as an unlimited right of transfer from belligerent to neutral owners, irrespectively of time or place, might evidently be used as a means of preserving belligerent property from confiscation, a belligerent may refuse to recognise any transfers of property which seem to him to be made with fraudulent intent; and as a matter of fact sales of such property as is liable to capture at sea are not indiscriminately permitted.

The right which a neutral has to carry on innocuous trade with a belligerent of course involves the general right to export from a belligerent state merchandise which has become his by *bonâ fide* purchase. Vessels, according to the practice of France, and apparently of some other states, are however excepted on the ground of the difficulty of preventing fraud. Their sale is forbidden, and they are declared good prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of a war [1]. In England and

[1] Pistoye et Duverdy, ii. 3. The sale of a vessel, to be good, must be proved by authentic instruments anterior to the commencement of hos-

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the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war [1].

With respect to vessels and merchandise, belonging to an enemy, in transit upon the ocean, the French doctrine gave no scope for special usage until the freedom of neutral goods on board belligerent vessels was accepted by the Declaration of Paris. A valid sale of a vessel being always impossible during war, enemy goods on board an enemy vessel necessarily remained liable to capture; and enemy goods in course of transport by a neutral being protected by the flag, the effect of sale did not need to be considered. By English and American custom all sales during war of property *in transitu* are bad, unless the transferee has actually taken possession, the probability that they are fraudulently intended being thought to be so high as to amount to a practical certainty; in the words of Lord Stowell,

tilities, and must be registered by a public officer. The practice dates back to 1694, when it was defined by the Règlement of Feb. 17 of that year. Valin, Ord. de la Marine, ii. 246.

[1] The Bernon, i Rob. 102; Halleck, ii. 139; Admiralty Manual of Naval Prize Law (Holland), 1888, p. 9. The principle that the circumstances of the sale must be clear has been sometimes applied with extreme stringency. Before the Crimean War a vessel was sold by its Russian owner to a Belgian firm; the vessel was afterwards brought in for adjudication on suspicion of the sale being fraudulent. The sale was genuine, but it had not been made to the persons who professed to be owners. Restitution was decreed, but without costs or damages. The general rule was laid down that 'if any doubt exists as to the character of a ship claimed to be the property of a neutral being still enemy's property, the claimant shall be put to strict proof of ownership, and any circumstances of fraud or contrivance, or attempt at imposition on the court, in making out his title, is fatal to the claimant. Condemnation of the ship as enemy's property necessarily follows.' Bullen v. The Queen, xi Moore, 271.

'if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect[1].'

Transfer of property by an enemy immediately before war.

Transfer *in transitu* being legitimate in time of peace, transfers effected up to the actual outbreak of war are *primâ facie* valid; where however it appears from the circumstances of the case that the vendor has sold, to the knowledge of the purchaser, in contemplation of war the contract is invalidated, notwithstanding that the purchaser may have been in no way influenced in buying by a wish to assist the vendor. The transaction is held to be in principle the same as a transfer *in transitu* effected during the progress of war. 'The nature of both contracts,' says Lord Stowell, 'is identically the same, being equally to protect the property from capture in war, not indeed in either case from capture at the present moment, but from the danger of capture when it is likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are in my opinion justly subject to the same rule[2].'

Goods consigned by neutrals from neutral ports to an enemy consignee, or *vice versâ*.

It is the general rule that a consignor, on delivering goods ordered to the master of a ship, delivers them to him as the agent of the consignee, so that the property in them is vested in the latter from the moment of such delivery. In time of peace this rule may be departed from by special agreement, or may be changed by the custom of a particular trade, so that the property in the goods may remain in the consignor until their arrival in the port of the consignee and actual delivery to him. In time of war, however, the English and American courts, keenly alive to the opening which would be given to fraud by allowing special

[1] The Vrow Margaretha, i Rob. 338; The Odin, ib. 250; The Ann Green, i Gallison, 291; Halleck, ii. 137; Admiralty Manual of Prize Law (Holland), 1888, p. 26.

[2] The Jan Frederick, v Rob. 133.

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agreements to be made, refuse to recognise them, as between a neutral consignor and an enemy consignee, whether they have been concluded during the progress of hostilities or in contemplation of them; and the breadth with which it is stated by Mr. Justice Story that in time of war 'property consigned to become the property of an enemy upon its arrival shall not be permitted to be protected by the neutrality of the shipper,' may give rise to a doubt whether proof of a custom of trade varying from the common rule would be admitted to prevent property shipped by a neutral to an enemy on the conditions of the custom from being confiscated. When the consignor is an enemy, as an attempt to disguise the true character of property would take the form, not of setting up a fictitious contract, but of hiding the existence of a real one, evidence is required that the consignee is as a matter of fact the owner. It must appear that he is bound absolutely to accept the goods, and that, except in the case of his insolvency, the consignor has no power to reclaim them [1]. French practice seems to be different [2].

Places belonging to a belligerent, which are in the military occupation of his enemy.

Although the national character of a place and its inhabitants is not altered by military occupation on the part of an enemy, yet for many belligerent purposes they are necessarily treated as hostile by their legitimate sovereign. They are in fact under the control of the enemy, and to treat them as friendly would be to relieve him from the pressure and losses of war. Trade with them, consequently, is subjected to the same restrictions as trade with the enemy and his territory, and property the produce of the country or belonging to persons domiciled there is confiscable under the same conditions as enemy's property. When, for example, the island of Santa Cruz was captured from Denmark by the British, some sugar shipped from there on board an English ship was captured by an American privateer, and was condemned as British property, Chief Justice Marshall saying

[1] The Packet de Bilboa, ii Rob. 133; The Ann Green, i Gallison, 291; The Francis, ib. 450; Kent, Comm. i. 86.

[2] Calvo, § 1998.

that 'some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation, although acquisitions made during war are not considered as permanent, until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them [1].'

It is to be regretted that this necessary doctrine has been used by the English and American courts to cover acts which it does not justify. It is reasonable that property which has become hostile through the conquest by an enemy of the port at which its owners are domiciled shall be condemned; but if this be done, no good cause can be shown for deciding that hostile property shall not become friendly to a belligerent state from the moment at which the latter obtains possession of the port to which the property belongs. Lord Stowell ruled otherwise. A vessel, owned by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland. The voyage was begun before the conquest of the Cape by the English, but the capture was effected afterwards. Lord Stowell condemned the vessel upon the ground, which would not have been taken up in the inverse case, and which, the change of character being involuntary, was not really in point, that the ship, 'having sailed as a Dutch ship, her character during the voyage could not be changed.' In like manner an English vessel was condemned during the American Civil War by a majority of judges in the Supreme Court, on the ground that 'the occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighbourhood, and the occupation limited, recent, and subject to the vicissitudes of war [2].' In both these cases

[1] Thirty Hogsheads of Sugar, ix Cranch, 195.

[2] The Danckebaar Africaan, i Rob. 107. The Circassian, ii Wallace, 135. In the latter case compensation for wrongful capture was subsequently

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the essential fact was lost sight of that the property of individuals engaged in mercantile acts is confiscated, not because they are personally hostile to the belligerent, but because they are members of the enemy state or closely associated with it, and so contribute to its strength, or else because they are doing acts inconvenient to the belligerent. So soon as they cease, in whatever manner, or from whatever cause, to be members of an enemy state, or to be associated with it, or so soon as their acts cease to be inconvenient, all reason for the confiscation of their property falls to the ground.

Places under double or ambiguous sovereignty.

It is possible for a place to possess at the same moment a belligerent and a neutral character. So long, for example, as the sovereignty of Turkey is not extinguished in Bosnia and the Herzegovina or in Cyprus, these provinces are probably capable of being belligerent territory in virtue of Austrian or English authority, and neutral territory in respect of Turkey, or *vice versâ*[1]; and while the German Confederation existed, that part of its territory which belonged to Austria or Prussia was always in this equivocal position whenever either of those states was at war.

Case of Triest in 1848.

On one occasion the awkwardness arising from a double character was brought strongly into notice. During the Austro-Sardinian war of 1848 an Austrian squadron took refuge from the Sardinian fleet in the port of Triest, which belonged both to Austria and the Confederation. A blockade was declared by the Italians on the grounds that Triest had become a *place de guerre*

awarded by the Mixed Commission on British and American Claims. Parl. Papers, North Am., No. 2, 1874, p. 124.

[1] [To these territories must now be added the Island of Crete. Since 1898 it has been under the government of a High Commissioner, appointed by Great Britain, Italy, France, and Russia, who is charged with the establishment of an autonomous administration, while recognising the Sovereign rights of the Sultan (Annual Register, 1898, p. 284; 1901, p. 305).] Their precise legal position it is very difficult, and perhaps impossible, to determine. Holtzendorff (1887; Handbuch, ii. § 51) examines it carefully, quotes the varying opinions of several recent writers, and comes to the conclusion that 'eine juristische Prüfung dieser Verhältnisse kann jedoch nur zu negativen Resultaten führen: es handelt sich um ein politisches Interimisticum, bei dem Recht und Thatsache in Widerspruch stehen.'

by being fortified with a castle and several batteries which were garrisoned by a numerous body of enemy troops, that the Austrian squadron had found refuge there, that the place had also been used for aggressive purposes, and that fire had been opened from it upon the Sardinian vessels. Upon the consuls of the various German states protesting against the blockade, the Italian admiral declared that he would recognise that the town belonged to the Confederation when the German colours were hoisted instead of the Austrian flag. Subsequently, after communication with his government, he announced that he would allow all merchant vessels, whether Austrian or foreign, to go in and out, provided that they had on board no soldiers, arms, or munitions of war, or articles of contraband for a naval force; all vessels were to be visited and were only to be permitted to enter or come out by day. While therefore the blockade was made as little onerous as possible, it was maintained in principle. The minister for foreign affairs of the Confederation protested against the measures taken by Sardinia; denying that as a matter of fact Triest had been used as a base of offensive operations, he argued that a state in amity with Germany could have no right to throw obstacles in the way of free communication between one of its ports and foreign countries, that in time of peace no right of visit existed, and that articles contraband of war were necessarily innocent from the neutrality of their port of consignment[1]. Supposing the fact to be, as stated by the minister, that Triest had not really been used for offensive purposes, the protest put forward on behalf of the Confederation amounts to a claim that where any shadow of over-sovereignty exists, and the one sovereign is neutral, territory shall be taken to be neutral notwithstanding that it is used as a place of retreat for defeated or overmatched forces and as a means of obtaining munitions of war and other supplies. The difference between such use and employment as a base of offensive operations is too slight to make it important to separate them in principle. If then any claim of

[1] De Martens, Nouv. Rec. Gén. xii. 497-506.

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the sort were admitted, it could hardly stop short of covering fully with the neutrality of an over-sovereign all belligerent use of territory in which over-sovereignty exists. Conversely the belligerency of an over-sovereign would taint such territory even though the whole effective authority within it were in the hands of a neutral.

The contention of the German Confederation was obviously inadmissible. It would indeed have been barely worth while to state it if it did not serve to bring into relief the necessity of frankly adopting the alternative view that the belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the state *de facto* exercising permanent military control within it. As we have just seen, when a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil. In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in actual military possession, unless that possession has been given him for a specific purpose, such as that of securing internal tranquillity, which does not carry with it a right to use the territory for his military objects. On the other hand, where a scintilla of sovereignty is possessed by a belligerent state over territory where it has no real control, an enemy of the state, still fixing his attention on facts, must respect the neutrality with which the territory is practically invested.

Effect of a personal union between states.

It has been pointed out in a former chapter that states joined by a personal union are wholly separate states, which happen to employ the same agents for the management of their affairs, and that they are not responsible for each other's acts. It is the clear rule therefore that either may remain neutral during a war

in which the other is engaged. It is only necessary so far to qualify this statement as to say that any suspicion of indirect aid given by the neutral state, or of any fraudulent use of the produce of its taxes or other resources, gives the enemy of the belligerent power a right to disregard the character which the associated state claims to possess. The connexion between the two states is such, wherever at least the common sovereign may happen not to be trammelled by a constitution, that a right of ceasing to respect a neutrality thought to be unreal may fairly be held to arise upon less evidence of non-neutral conduct than would be required in the case of two wholly separate countries.

Case of the Convention of Suhlingen.

The irresponsibility of one of two states joined by a personal union for the acts of the other has usually, but not quite invariably, been respected by belligerents. In 1803 a case, in which one of two states united by a personal tie was improperly attacked on account of its connexion with the other, arose out of the personal union between England and Hanover. George III studiously kept distinct his position as Elector from that which he held as King; in 1795 the French government by allowing him to accede to the treaty of Basle in his former capacity had shown that they understood and acknowledged the reality of the severance which he made; and the principle of his neutrality as Elector had been confirmed both on the occasion of the treaty of Luneville, and by arrangements subsequently made with respect to the indemnities of German states. On the outbreak of war however between France and England in 1803 a French corps entered Hanover and compelled the electoral troops to capitulate at Suhlingen. A copy of the capitulation was sent over by the French government to Lord Hawkesbury, Secretary of State for Foreign Affairs, accompanied with the announcement that Hanover had been occupied as a pledge for the evacuation of Malta, with a demand that the capitulation should be ratified, and the statement that if it were not ratified Hanover should be treated with all the rigours of war, as a country which being abandoned by its sovereign had been

PART III CHAP. VI conquered without capitulation. Lord Hawkesbury, in refusing on behalf of George III to do any act which would imply an admission of identity between England and Hanover, pointed out that the neutrality of the latter country was not assumed with reference to the then existing circumstances, that it had been maintained during the former war, and that it had been recognised in the ways mentioned above. The French government nevertheless declared the Convention of Suhlingen to be null, and imposed a fresh and less favourable capitulation upon the Hanoverian army[1].

[1] De Martens, Rec. viii. 86; Alison's Hist. of Europe (ed. 1843), v. 140; De Garden, Hist. des Traités de Paix, viii. 192.

CHAPTER VII

MEANS OF EXERCISING THE RIGHTS OF OFFENCE AND DEFENCE

Division of the subject.

THE rights of offence and defence possessed by a belligerent community are exercised through the instrumentality of armed forces, and by means of military and naval operations. The legal questions which present themselves with reference to the constitution of armed forces being necessarily distinct from those having reference to the manner in which such forces may act, the general subject of the law dealing with the rights of offence and defence is primarily divided into two heads, the first of which may be again conveniently divided, since, though the principles which govern continental and maritime warfare are identical, the differences which exist in the external conditions under which the two are carried on lead to differences in the particular rules affecting the constitution of the forces employed.

Hostilities on land.

Question as to who are legitimate combatants.

Hostilities on land are for the most part carried on by the regular army of a state. The characteristics of this force from a legal point of view may be said to be that it is a permanently organised body, so provided with external marks that it can be readily identified, and so under the efficient control of the state that an enemy possesses full guarantees for the observance by its members of the established usages of war. It is the instrument expressly provided for the conduct of hostilities, and expressly adapted to carry them on in a legal manner.

But belligerent acts are also performed by bodies of men less formally organised, and the legal position of some of these is not yet so defined as to be in all cases clear.

It has been seen that although all the subjects of a belligerent state were originally in fact, and still are theoretically, the enemies of the enemy state, a distinction has long been made,

under the influence of humanity and convenience, between combatant and non-combatant individuals. The latter are not proper objects of violence; the former may be killed and made prisoners, but when captured they must be treated in a specified way. It is evident that the treatment which is accorded to the two classes respectively, and the distinctive privileges which they enjoy, being caused by the difference in their character, must have been conceded on the tacit understanding that the separation between them shall be maintained in good faith. Non-combatants are exempted from violence because they are harmless; combatants are given privileges in mitigation of the full right of violence for the express reason that they hold themselves out as open enemies. If either class were able to claim the immunities belonging to the other without permanently losing those proper to itself, an enemy would have made concessions without securing any corresponding advantage. Non-combatants would not be harmless and combatants would not be known. Those persons only therefore can properly do belligerent acts and claim belligerent privileges on being captured who openly manifest their intention to be combatant; and a belligerent, before granting such privileges, has obviously the right to exact evidence of intention. In the case of an invading army the distinction is easily made. With the exception of surgeons and other persons, whose employments, though ancillary to war, are conventionally regarded as peaceful, all persons must be taken to be combatant. But in the case of defensive forces the legitimate demands of an invader tend to conflict with the unrestricted right of self-defence, which is possessed by the individual as a component part of the assailed community. It is impossible to push the doctrine that combatants and non-combatants must remain separate to its logical results when the duty and sentiment of patriotism, and the injury, which even in modern warfare is always suffered by private persons, combine to provoke outbursts of popular resistance. Persons must sometimes be admitted to the privileges of soldiers who are not included in the regular army. At the same time the

interests of invading belligerents lead them to reduce the range of privilege as much as possible. Naturally practice shows the marks of these opposing influences. It is confused and not a little uncertain.

The evidences of intention to form part of the combatant class, which belligerents have been in the habit of exacting, fall under the heads of—

1. The possession of an authorisation given by the sovereign.
2. The possession of a certain number of the external characteristics of regular soldiers.

Whether an authorisation from the sovereign is necessary.

The rule that permission from the sovereign is the condition of legitimate warfare, as a matter of historical fact, sprang rather from the requirements of sovereignty than from those of the belligerent rights possessed by an enemy. When the notions involved in the idea of the modern state began to be formed, sovereigns in investing themselves with the exclusive right to make war, by implication kept to themselves the right of regulating the war when begun, and so refused to their subjects the power of attacking the common enemy when and how they pleased. Subjects acted simply as the agents of the sovereign. At first they were all agents. The want of fleets and sufficient armies compelled sovereigns to rely upon the population at large; leave therefore was usually given in a general manner at the beginning of war, and the declaration that 'we permit and give leave to all our subjects to take up arms against the above-named by sea and land,' or the order to 'courir sus' upon all the subjects of the enemy rendered warfare permissible to every one who chose to undertake it[1]. But as war became more systematic, offensive operations were necessarily conducted by the regular forces of the state; and in defence it was found, either that irregular levies plundered their fellow-countrymen without doing service against the enemy, or that the rising of an unarmed peasantry in despair was merely the signal for a massacre. The old forms of

[1] 'Le Cry de la Guerre ouverte entre le Roi de France et l'Empereur' in the Papiers d'Etat du Cardinal de Granvelle, ii. 630; Dumont, vii. i. 323.

permission continued, but they ceased to have a natural meaning[1]; and in the eighteenth century hostilities on land were in practice exercised only by persons furnished with a commission from their sovereign. Belligerents acting on the offensive were not slow to give to facts an interpretation in consonance with their interests; and although the right of taking up arms in its own defence with the permission of the sovereign might still be conceded in books to an invaded population[2], it became the habit to refuse the privileges of soldiers not only to all who acted without express orders from their government, but even to those who took up arms in obedience to express orders when these were not addressed to individuals as part of the regular forces of the state[3]. The doctrine

[1] For instance, Vattel says that in the eighteenth century the order to 'courir sus' was understood as meaning that persons and things belonging to the enemy were to be detained if they fell into the hands of those to whom the order was addressed, but that it gave no right of offensive action; liv. ii. § 227.

[2] Vattel, liv. iii. § 223.

[3] De Martens, Précis, § 271. See the Proclamations of the Austrians on entering Provence in 1747 and Genoa in 1748 (Moser, Versuch, ix. i. 232–6), of the French on landing in Newfoundland in 1762 (ib. 240), and of the French on entering Hanover in 1761 (Ann. Register for 1761, p. 278).

Jomini (Guerres de la Révolution, viii. 137) in speaking of the execution, by Napoleon's orders in 1796, of the magistrates of Pavia and the slaughter of the peasants who had endeavoured to defend the town, says that 'le droit public moderne avait jusqu'alors tiré une ligne de démarcation positive entre le citoyen paisible et les troupes de la ligne, et les habitants qui prenaient part aux hostilités sans faire partie de l'armée régulière étaient traités comme des révoltés.'

A proclamation issued by the commanders of the Russo-Austrian army in the Lower Valais in 1799 is of little interest with reference to the present point, because the invaders may have looked upon the population of the Lower Valais as being in insurrection against the suzerainty of the Upper Valais; but it is sufficiently atrocious and curious to be worth quoting on its own account. The generals order 'le peuple du bas Valais par la présente de poser les armes sans aucun délai,' and declare that 'si au mépris de notre proclamation . . . quelques-uns d'entre vous sont trouvés les armes à la main, nous vous annonçons qu'ils seront sans grâce passés au fil de l'épée, leurs avoirs confisqués, et leurs femmes et enfants même ne seront pas épargnés pour servir d'exemple à tous les mutins. C'est pourquoi, chrétiens frères, rentrez en vous-mêmes, tournez enfin vos armes contre vos véritables ennemis, qui vous trompent en se disant vos amis; songez que votre dernière heure a sonné et qu'il dépend encore dans cet instant de vous choisir votre parti.' Koch, Mém. de Masséna, Pièces justificatives, iii. 475.

which was thus on the point of being fixed was however to a great extent broken down by the events of the French revolutionary and imperial wars. France, Prussia and Russia all called upon their people at different times to embody themselves in levies which until then had not been recognised as legitimate, and other states encouraged or permitted still more irregular risings. No doubt nations were little willing to accord to others the rights of defence which they used for themselves; but the change in the character of wars from mere contests of princes, as they generally were in the eighteenth, to struggles between peoples, as they generally were in the beginning of the following century, left its trace upon opinion. Of the writers who more immediately succeeded the Napoleonic period De Martens appears to incline to the old doctrine; but Wheaton gives combatant privileges not only to the regular forces of a nation, but to 'all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose;' and Klüber recognises levies *en masse*, and thinks besides that inhabitants of a fortress assisting in its defence act under an implied authorisation [1]. Statements of this kind, made after the question of the permissibility of the employment of subjects otherwise than as regular soldiers had been brought forcibly to the attention of the world, have greater weight than those of earlier writers. For a long time it was not necessary for any state to declare itself on the subject. In 1863 however it fell to the lot of the United States to do so. In that year the 'Instructions for the Government of Armies in the Field' were issued, and the 51st article says that 'if the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorised levy, *en masse* to resist the invader, they are now treated as public enemies, and if captured, are prisoners of war.' In 1870 the Germans acted in a harsher spirit. Notwithstanding

[1] De Martens, Précis, § 271; Wheaton, Elem. pt. iv. ch. ii. § 9; Klüber, § 267.

that a law was passed by the French Assembly in August of that year under which 'citizens rising spontaneously in defence of the territory' were 'considered to form part of the national guard,' provided that they were distinguished by one at least of the distinctive signs of that corps, the Prussian government required that 'every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier by showing that he has been called out and borne on the lists of a military organised corps, by an order emanating from the legal authority and addressed to him personally[1].' This requirement, though far less stringent than the demands made in the eighteenth century, has failed to commend itself to the minds of jurists[2]; and the ninth article of the Declaration of Brussels laid down only that corps of volunteers shall 'have at their head a person responsible for his subordinates.' The tenth article declared that 'the population of a territory, not occupied, which spontaneously takes up arms at the approach of an enemy in order to combat the invading force, without having had time to organise itself conformably' to certain other requirements of the preceding article, shall be considered as 'belligerent if it respects the laws and customs of war.' Under these proposals, which were approved of by the larger military powers, and to which objection was made by the delegates of the smaller states on the ground only that enough scope was not left by them for spontaneous effort, the doctrine of state authorisation was doomed for all practical purposes to disappear.

[1] Art. ii of the French law mentioned provided that 'sont considérés comme faisant partie de la garde nationale les citoyens qui se portent spontanément à la défense du territoire avec l'arme dont ils peuvent disposer, et en prenant un des signes distinctifs de cette garde qui les couvre de la garantie reconnue aux corps militaires constitués.' Calvo, § 1800. Proclamation of the General commanding-in-chief transcribed from the German Recueil Officiel, published at Versailles, in Delerot, Versailles pendant l'Occupation, 104. Part of a similar proclamation is quoted by Bluntschli, § 570, bis.

[2] The majority of the members of the Institute of International Law present at the Hague in 1875, by expressing their approval of the Russian project of a declaration upon the laws and customs of war as modified by the Brussels Conference, condemned the conduct of the Germans.

In some cases a rising would be permitted without authorisation, whether express or implied; in all it would be implied if a responsible person, not necessarily a soldier, were found at the head of a body of men possessing certain of the external marks characteristic of regular forces. The requirement of a state authorisation is generally superfluous. It offers no guarantee for the observance of the usages of war that is not better given by other rules, which are in most cases necessary, and to the enforcement of which there is no objection. In the few cases where the requirement of authorisation would work independently it may be questioned whether its effect would not be distinctly bad. History does not suggest that sudden uprisings of a population in face of an advancing enemy will often occur; but when they do take place, the depth of the patriotic sentiment which must have inspired them, and their helplessness against an organised force, call rather for treatment of unusual leniency than for exceptional severity.

Whether the possession of some of the external characteristics of regular soldiers is required.

The characteristics of regular soldiers which armed forces have been required by belligerents to possess as the condition of being recognised as legitimate combatants, may be said to be, either together or separately, according to the circumstances of the case,—

1. The fact of acting in more or less organised bodies of considerable size.
2. The existence of a responsible chief.
3. The possession of a uniform, or of permanent distinguishing marks on the dress.

With these conditions, as with authorisation, the tendency of usage has of late been towards relaxation. According to De Martens[1], it was scarcely allowed in the eighteenth century that a militia force could claim the privileges of regular troops, although in its nature it is a permanently organised body and consequently rather more than satisfied the first two of the three requirements. There are certainly some cases which go as far as

[1] Précis, § 271.

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this. In 1742 the Austrians excluded the Bavarian militia from belligerent rights; and the capitulation of Quebec in 1759, by providing that the inhabitants who had borne arms should not be molested, on the ground that 'it is customary for the inhabitants of the colonies of both crowns to serve as militia,' suggests that, apart from the special custom, they would have been left to the mercy of the English general[1]. The root of this indisposition to admit militia to be legitimate combatants was rather in military pride than in any doubt as to the sufficiency of the guarantees which they presented. Through prejudice inherited from feudal times and the era of mercenaries, soldiers thought a militia unworthy to share in privileges which were looked upon as the sign of the honourable character of the military calling, because its members were neither soldiers by profession, nor able to share in the larger operations of war which were the peculiar business of the latter. The same causes which shook the doctrine of the necessity of express authority during the revolutionary and Napoleonic wars could not but be fatal to a distinction founded on no more solid a basis than this; and accordingly from that time no doubt has been entertained as to the legitimacy in principle of militia and other imperfectly organised levies. Such questions as exist refer solely to the quantity and relative value of the marks by which the legal position of a force, not belonging to the army proper, can be ascertained.

Imperfectly organised levies permissible in principle.

Controversy during the Franco-German war of 1870.

In the course of the war of 1870–1 bodies of irregulars called Francs Tireurs were formed in France, who acted independently, without a military officer at their head, and who were distinguished in respect of dress only by a blue blouse, a badge, and sometimes a cap. The Germans refused to consider them legitimate belligerents on the double ground that they were not

[1] Moser, Versuch, ix. i. 268; Ann. Regist. for 1759, p. 247. By the capitulation of the French troops in Canada in the ensuing year it is agreed that the militia 'shall not be molested on account of their having carried arms.' Ann. Regist. for 1760, p. 222.

embodied as part of the regular forces of the state, viz. as part of the army or of the Garde Mobile, and that the distinguishing marks on the dress were insufficient or removable. The blouse, it was said, was the common dress of the population, and the badge and cap could be taken off and hidden at will. It was demanded that the marks should be irremovable and distinguishable at rifle distance. Where bodies of men are small, are acting independently, and especially if they are not under the immediate orders either of a military officer or of a local notability, such as a mayor in certain countries, an administrative official of sufficient rank, or a landed proprietor of position, they depend solely upon their dress marks for their right to belligerent privileges, since it is solely through them that the enemy can ascertain their quality. It is clear therefore that such marks must be irremovable; but to ask for marks distinguishable at a long distance is to ask not only for a complete uniform, but for a conspicuous one. The essential points are that a man shall not be able to sink into the class of non-combatants at his convenience, and that when taken prisoner there shall be no doubt on the patent facts how he ought to be dealt with. For both these purposes irremovable marks, clearly distinguishable at a short distance, are amply sufficient.

Brussels Conference.

The question whether irregular levies must be under the general military command, whether in fact, as a matter not of authorisation but of the sufficiency of the guarantees which it can offer for proper behaviour, a population has the right of spontaneous action in a moment of opportunity or emergency, was discussed at the Conference of Brussels. In the original draft Project of Convention it was made a condition of the possession of combatant rights that the persons claiming to have them should be under such command, and the representative of Germany showed a strong desire to maintain the requirement. After a good deal of discussion however the paragraph containing the condition was modified, and it became difficult for the great military states to ignore the admissions made on their behalf, and to refuse to

Requirements which may reasonably be exacted from

acknowledge bodies of men headed by any responsible person as being combatant, irrespectively of connexion with the general military command, provided that, as a body, they conform to the rules of war, and that if in small numbers they are distinguishable by sufficient marks. If in large numbers the case is different. Large bodies, which do not possess the full marks of a militia, must belong to one of two categories. They must either form part of the permanent forces of a state, which from poverty or some other reason is unable to place them in the field properly uniformed, or perhaps officered, as in the instance of the Norwegian Landsturm, to which attention was directed at Brussels by the Swedish representative[1]; or else they must consist in a part of the unorganised population rising in arms spontaneously or otherwise in face of the invader. In neither case are dress marks required. In the first the dependence on military command is immediate, and affords sufficient guarantees. In the second, dress marks are from the nature of the case impossible as well as unnecessary. The fact that a large body is operating together sufficiently separates it as a mass from the non-combatant classes, and there can be no difficulty in supplying the individual members with certificates which would prove their combatant quality when captured singly or in small detachments. The possession of belligerent privilege in such cases hinges upon subordination to a responsible person, who by

1. men acting in small bodies,

2. men acting in large bodies.

[1] The case of the Ordenanza in Portugal was similar. It was an organised but un-uniformed militia, which during the advance of Massena in 1810 was used by Lord Wellington to harass the communications of the French army. Massena issued an order that all who might be captured should be shot, on which the English general addressed a letter to the former stating that 'ce que vous appelez "des paysans sans uniforme," "des assassins et des voleurs de grand chemin," sont l'Ordenanza du pays, qui comme j'ai déjà eu l'honneur de vous assurer sont des corps militaires commandés par des officiers, payés, et agissant sous les lois militaires. Il paraît que vous exigez que ceux qui jouiront des droits de la guerre soient revêtus d'un uniforme; mais vous devez vous souvenir que vous-même avez augmenté la gloire de l'armée française en commandant des soldats qui n'avaient pas d'uniforme.' Wellington Despatches, vi. 464. 'La leçon que Masséna reçut à cette occasion du général anglais ne saurait être trop connue,' remarks Lanfrey, Hist. de Nap. i. v. 386.

his local prominence, coupled with the fact that he is obeyed by a large force, shows that he can cause the laws of war to be observed, and that he can punish isolated infractions of them if necessary[1].

Hague Convention.

[The principles which were maintained at Brussels and supported at greater detail in the previous editions of this book have now been largely adopted by the Hague Convention, and may be regarded as law. By the first article of that instrument it was declared that the laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps fulfilling the following conditions, namely that they should:

1. Be commanded by one person responsible for his subordinates;
2. Have a fixed distinctive emblem recognisable at a distance;
3. Carry arms openly; and
4. Conduct their operations in accordance with the laws and customs of war.

The second article provides, that if the population of a territory which has not been occupied shall spontaneously take up arms on the enemy's approach to resist the invading troops without having time to organise themselves in accordance with the former article, they shall be regarded as belligerents if they respect the laws and customs of war. It will be noticed that the doctrine of state authorisation is thus abandoned, and that in case of a national rising against an invader the necessity for a commander responsible for the action of his subordinates is apparently waived, as well as the possession by the combatants of any distinctive marks. To dispense with such requirements

[1] D'Angeberg, Nos. 375, 854; Parl. Papers, Miscell., No. i. 1875, 80, 122, 140; arts. 9 and 45 of the Project of Convention, and arts. 9 and 10 of the Project of Declaration of Brussels. See also American Instruct., §§ 49, 51–2; the French Manuel de Droit Int. à l'Usage, &c., 30; and the Manual of the Inst. de Droit Int., art. 2.

M. Rolin Jaequemyns (La Guerre Actuelle and Second Essai sur la Guerre Franco-Allemande) and Mr. Droop (Papers read before the Juridical Soc., vol. iii. pt. xxi) have examined the questions treated of in the above section.

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is open to the grave objections pointed out on a previous page, and we may hazard the conjecture that non-compliance with the latter of them at any rate would be regarded as a breach of the laws and customs of war.]

Maritime hostilities.

Hostilities at sea are in the main carried on by the regular navy of the state, which corresponds with the regular military forces employed on land.

Privateers.

Until lately all maritime states have also been in the habit of using privateers, which are vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility which are permissible at sea by the usages of war. Before giving a privateering commission, it is usual for the government issuing it to require the lodgment of caution money or the execution of a bond by way of security against illegal conduct on the part of the holder, and against a breach of the instructions which are issued for his guidance. The commission is revocable on proof of its misuse being produced, and by the English law at least the owners of the vessel were liable in damages; it was also usual for the Lords of the Admiralty to institute proceedings in the Admiralty Court upon complaint of ill-conduct. As a further safeguard, a privateer is liable to visit by public vessels of war; and as she is not invested with a public character, neutral ships of war are permitted to verify the lawfulness of the commission under which she sails by requiring its production.

Universally as privateers were formerly employed, the right to use them has now almost disappeared from the world. It formed part of the Declaration adopted at the Congress of Paris in 1856 with reference to Maritime Law that 'privateering is and remains abolished;' and all civilised states have since become signataries of the Declaration, except the United States, Spain, and Mexico. For the future privateers can only be employed by signataries of the Declaration of Paris during war with one of the last-mentioned states[1]. [Strangely enough the most im-

[1] [Hertslet, Map of Europe by Treaty, No. 271.]

portant maritime war since the Declaration of Paris has been waged between two of these non-signatary powers. In 1898 the United States government announced its intention 'not to resort to privateering, but to adhere to the rules of the Declaration of Paris.' Spain, while maintaining her right to issue letters of marque, limited herself by proclamation 'for the immediate present' to 'a service of auxiliary cruisers of the navy composed of ships of the Spanish mercantile marine and subject to the statutes and jurisdiction of the navy.' The Spanish government also declared its intention of treating as pirates the officers of non-American vessels manned as to one-third of the crew by other than American citizens and committing acts of war against Spain[1].] PART III CHAP. VII

Volunteer navy.

A measure taken by Prussia during the Franco-German war of 1870 opens a rather delicate question as to the scope of the engagement not to employ privateers by which the signataries of the Declaration of Paris are bound. In August of that year the creation of a volunteer navy was ordered by decree. The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services; the vessels were to sail under the flag of the North German navy. The French government protested against the employment of private vessels in this manner as an evasion of the Declaration of Paris, and addressed a despatch on the subject to the government of England. The matter was laid before the law officers of the Crown, and they reported that there were substantial differences between a volunteer navy as proposed by

[1] [Hertslet, Commercial Treaties, xxi. pp. 836, 1074.]

the Prussian government and the privateers which it was the object of the Declaration to suppress. Lord Granville in consequence declared himself unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered. Nevertheless it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organised in the above manner would necessarily be always of a kind to prevent the two from being identical in all important respects. In both the armament is fitted out by persons whose motive is wish for gain, in both the crews and officers are employed by them and work therefore primarily rather in their interests than in those of the nation. The difference that in the particular case of the Prussian volunteer navy attacks upon men of war were alone contemplated was accidental and would have been temporary. At the beginning of the war Prussia announced her intention not to capture private property at sea in the hope of forcing France to spare the commerce which she was herself unable to protect. If the war had been continued for any length of time after January 1871, when this announcement was withdrawn, and if a volunteer navy had in fact been formed, it would of course have been authorised to capture private property; and there is no reason to suppose that any state acting upon the custom of seizing private property would make a distinction between public and private vessels in the powers given to its volunteer navy. The sole real difference between privateers and a volunteer navy is then that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it[1]. It cannot be supposed that the Declaration of Paris was merely intended to put down the use of privateers governed by

[1] Bluntschli (§ 670) makes the fact that the Prussian volunteer navy was to be under general naval command a point of distinction from privateers. But, as he properly says in an earlier part of the same section, 'le corsaire reconnaissait l'autorité de l'amiral commandant la flotte.' Was the dependence intended to be closer in the one case than it has been in the other?

the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief was well founded or not is another matter. If the organisation intended to be given to the Prussian volunteer navy did not possess sufficient safeguards, some analogous organisation no doubt can be procured which would provide them. If so there could be no objection on moral grounds to its use; but unless a volunteer navy were brought into closer connexion with the state than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris[1].

The incorporation of a part of the merchant marine of a country in its regular navy is of course to be distinguished from such a measure as that above discussed. A marked instance of incorporation is supplied by the Russian volunteer fleet. The vessels are built at private cost, and in time of peace they carry the mercantile flag of their country; but their captain and at least one other officer hold commissions from their sovereign, they are under naval discipline, and they appear to be employed solely in public services, such as the conveyance of convicts to the Russian possessions on the Pacific. Taking the circumstances as a whole, it is difficult to regard the use of the mercantile flag as serious; they are not merely vessels which in the event of war can be instantaneously converted into public vessels of the state, they are properly to be considered as already belonging to the imperial navy. The position of vessels belonging to the great French mail lines is different. They are commanded by a commissioned officer of the navy, but so long as peace lasts their employment

[1] D'Angeberg, Nos. 352 and 362; Bluntschli, § 670; Calvo, § 2086. M. Geffcken (note to Heffter, ed. 1883, p. 279) is right in saying that the action of Prussia 'ne prouve qu'une chose, c'est que l'abolition de la course n'a pas résolu toute la question.'

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is genuinely private and commercial; means is simply provided by which they can be placed under naval discipline and turned into vessels of war so soon as an emergency arises. They are not now incorporated in the French navy, but incorporation would take place on the outbreak of hostilities. [The Liners which of recent years have been subsidised by the British Government in return for a lien on their services as cruisers in time of war stand on a similar footing, except that in peace time they are not under the command of an officer in the Royal Navy.]

Right of non-commissioned vessels to resist capture.

Non-commissioned vessels have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews therefore which make such resistance have belligerent privileges; and it is a natural consequence of the legitimateness of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war[1].

Attack by non-commissioned ships illegitimate.

By some writers it is asserted that a non-commissioned ship has also a right to attack[2]. If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it[3], there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument. There is no such reason at sea as there is on land for permitting ill-regulated or unregulated action. On the common ground of the ocean a man is not goaded to leave the non-combatant class, if he naturally belongs to it, by the peril of his country or his home. Every one's right to be there being moreover equal, the initiative in acts of hostility must always be aggressive; and on land irregular levies only rise

[1] Kent, i. 94; Halleck, ii. 12; Mr. Justice Story in Brown v. The United States, viii Cranch, 135.

[2] Wheaton, pt. iv. ch. ii. § 9. Kent (i. 96) thinks that persons depredating without the leave of their state expressed in a commission commit a municipal wrong, but that 'as respects the enemy they violate no rights by capture.'

[3] Vattel, liv. iii. ch. xv. § 226; De Martens, Précis, § 289; Queen's Naval Regulations, 1861.

for defence, and are only permissible for that purpose. It is scarcely necessary to add that non-commissioned ships offer no security that hostilities will be carried on by them in a legitimate manner. Efficient control at sea must always be more difficult than on land; and if it was found that the exercise of due restraint upon privateers was impossible, *à fortiori* it would be impossible to prevent excesses from being indulged in by non-commissioned captors.

General limitation upon the rights of violence.

In a general sense a belligerent has a right to use all kinds of violence against the person and property of his enemy which may be necessary to bring the latter to terms. *Primâ facie* therefore all forms of violence are permissible. But the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted so soon as it is shown that they are wanton, but when they are grossly disproportioned to the object to be attained; and the sense that certain classes of acts are of this character has led to the establishment of certain prohibitory usages.

These prohibitory usages limit the right of violence in respect of

1. The means of destruction which may be employed.

2. The conditions under which a country may be devastated.

3. The use of deceit.

Some questions not falling under either of these heads have to be determined by reference to the general limitation forbidding wanton or disproportionate violence.

Specific usages with respect to, 1. The means of destruction which may be employed;

The first of the above prohibitory usages may be described as the rough result of a compromise between a dislike to cause needless suffering and a wish to use the most efficient engines of war. On the whole it may be said generally that weapons are illegitimate which render death inevitable or inflict distinctly more suffering than others, without proportionately crippling the enemy. Thus poisoned arms have long been forbidden, and guns must not be loaded with nails or bits of iron of irregular

shape. To these customary prohibitions the European powers, except Spain, have added as between themselves the abandonment of the right to use explosive projectiles weighing less than fourteen ounces; and in the Declaration of St. Petersburg, by which the renunciation of the right was effected in 1868, they took occasion to lay down that the object of the use of weapons in war is 'to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity[1].' [In one of the supplementary Hague Declarations of July 29, 1899, the representatives of all the powers assembled, with the exception of Great Britain, the United States and Portugal, bound themselves to abstain from the use of bullets which expand or flatten in the human body[2].] On the other hand, the amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate. Thus no objection has ever been made to mines; it is not thought improper to ram a vessel so as to sink her with all on board; and torpedoes have been received without protest among the modern engines of war. [The powers assembled at the Hague,

[1] De Martens, Nouv. Rec. Gén. xviii. 474, or Hertslet, No. 414; Vattel, liv. iii. § 156; Ortolan, liv. iii. ch. i; Bluntschli, §§ 557–8. Klüber (§ 244) pretends that the use of chain-shot is forbidden. Heffter (§ 124) and Bluntschli (§ 560) transform into a prohibition of red-hot shot the remarks of Klüber and De Martens (§ 273 note) that its use has been renounced by agreement in several naval wars, and that doubts have been expressed as to whether it can be legitimately employed. [The Hague Convention, art. 23, apart from the stipulation of the Geneva or other Conventions, prohibits the employment of poison, poisoned weapons, and of any weapons, projectiles or materials calculated to cause unnecessary suffering.]

[2] ['Balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions.' The objection felt by a power like Great Britain, whose normal warfare is conducted against savage tribes, has received fresh justification during the recent military operations in Somaliland; to the warriors of the Indian frontier or the Soudan the Lee-Metford bullet is little more than a pinprick unless it breaks a limb or touches a vital organ.]

with the exception of Great Britain and the United States, bound themselves to prohibit the employment of projectiles solely intended to spread asphyxiating or noxious gases. Lyddite, which was presumably aimed at, was freely employed in the South African War with somewhat disappointing results; its object moreover is primarily destructive, only secondarily asphyxiating. In another of the Hague Declarations the powers, with the exception of Great Britain, bound themselves for a probationary period of five years from July 1899 to abstain from utilising balloons or analogous inventions for dropping projectiles and explosives.]

2. Devastation;

Devastation is capable of being regarded independently as one of the permitted kinds of violence used in order to bring an enemy to terms, or as incidental to certain military operations, and permissible only for the purpose of carrying them out. Formerly it presented itself in the first of these aspects. Grotius held that 'devastation is to be tolerated which reduces an enemy in a short time to beg for peace,' and in the practice of his time it was constantly used independently of any immediate military advantage accruing from it[1]. But during the seventeenth century opinion seems to have struggled, not altogether in vain, to prevent its being so used in more than a certain degree; and though the devastation of Belgium in 1683 and of Piedmont in 1693 do not appear to have excited general reprobation[2], Louis XIV was driven to justify the more savage destruction of the Palatinate by alleging its necessity as a defensive measure for the protection of his frontiers. In the eighteenth century the alliance of devastation with strategical objects became more close. It was either employed to deny the use of a tract of country to the enemy by rendering subsistence difficult, as when

[1] De Jure Belli et Pacis, lib. iii. c. xii. § 1.

[2] But the better minds of the time already disapproved of devastation. Evelyn (Memoirs, iii. 335) says, under the date 1694, 'Lord Berkeley burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of destructive war was begun by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.'

the Duke of Marlborough wasted the neighbourhood of Munich in 1704, and the Prussians devastated part of Bohemia in 1757; or it was an essential part of a military operation, as when the Duc de Vendôme cut the dykes and laid the country under water from the neighbourhood of Ostend to Ghent, while endeavouring to sever the communications with the former place of the English engaged in the siege of Lille[1]. At the same time devastation was still theoretically regarded as an independent means of attack. Wolff declares it to be lawful both as a punishment and as lessening the strength of an enemy; Vattel not only allows a country to be 'rendered uninhabitable, that it may serve as a barrier against forces which cannot otherwise be arrested,' but treats devastation as a proper mode of chastising a barbarous people; and Moser in like manner permits it both in order to 'deprive an enemy of subsistence which a territory affords to him,' and 'to constrain him to make peace[2].' But every few years an advance in opinion is apparent. De Martens restricts further the occasions upon which recourse can be had to devastation. Property he says may be destroyed which cannot be spared without prejudicing military operations, and a country may be ravaged in extraordinary cases either to deprive an enemy of subsistence or to compel him to issue from his positions in order to protect his territory[3]. Even at the beginning of this century instances of devastation of a not necessary kind occasionally present themselves. In 1801 the enlargement of Lake Mareotis by the English during the siege of Alexandria was no doubt justified by the bare law as it was then understood; but the measure, though of great advantage to the besiegers, was not the sole condition of success[4]. The destruction of the towns of Newark and York by the American troops during their retreat from Canada in 1813 and of the

[1] Marlborough's Despatches, i. 378 and iv. 269; Moser, Versuch, ix. i. 122.

[2] Wolff, Jus Gentium, § 823; Vattel, liv. iii. c. ix. § 167; Moser, Versuch, ix. i. 121.

[3] Précis, § 280.

[4] Wilson's Hist. of the British Expedition to Egypt, ii. 65.

public buildings of Washington by the English in 1814 may be classed together as wholly unnecessary and discreditable [1]. The latter case was warmly animadverted upon by Sir J. Mackintosh in the House of Commons; and since that time not only have no instances occurred, save by indulgence in an exceptional practice to be mentioned presently, but opinion has decisively laid down that, except to the extent of that practice, the measure of permissible devastation is to be found in the strict necessities of war [2].

When devastation is permissible.

The right being thus narrowed, it is easy to distinguish between three groups of cases, in one of which devastation is always permitted, while in a second it is always forbidden, and in a third it is permitted in certain circumstances. To the first group belong those cases in which destruction is a necessary concomitant of ordinary military action, as when houses are razed or trees cut down to strengthen a defensive position, when the suburbs of a fortified town are demolished to facilitate the attack or defence of the place, or when a village is fired to cover the retreat of an army. Destruction, on the other hand, is always illegitimate when no military end is served, as is the case when churches or public buildings, not militarily used and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town. Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender; it would even be impossible to deny to an invader the right to cut the dykes of Holland to save himself from such a fate; but when, as in the case supposed, the devastation is extensive in scale and lasting in effect, modern opinion would demand that the necessity should be extreme and patent [3].

[1] The case of Washington so far differs from the former that it may perhaps be not unreasonably defended as an act of reprisals.

[2] Ann. Regist. for 1814, pp. 145 and 177; Hansard, xxx. 527; Manning, ch. v; Heffter, § 125; Twiss, War, § 65; Bluntschli, § 663; Calvo, § 1919.

[3] It is scarcely necessary to point out that the above restrictions upon devastation apply only to devastation of an enemy's country.

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So stands the law; and no change has taken place in the conditions under which war is waged that can justify or excuse a change in practice. Nevertheless it was seen in a former section[1] that some naval officers of authority are disposed to ravage the shores of a hostile country and to burn or otherwise destroy its undefended coast towns; on the plea, it would appear, that every means is legitimate which drives an enemy to submission. It is a plea which would cover every barbarity that disgraced the wars of the seventeenth century. That in the face of a continued softening of the customs of war it should be proposed to introduce for the first time into modern maritime hostilities[2] a practice which has been abandoned as brutal in hostilities on land, is nothing short of astounding. Happily, before things of such kind are done, states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth[3].

Bombardment of towns.

The exceptional practice of which mention has been made consists in the bombardment, during the siege of a fortified town, of the houses of the town itself in order to put an indirect pressure on the commandant inducing him to surrender on account of the misery suffered by the inhabitants. The measure is one of peculiar cruelty, and is not only unnecessary, but more often than not is unsuccessful. It cannot be excused; and can only be accounted for as a survival from the practices which were formerly regarded as permissible and which to a certain extent

[1] Antea, p. 433.

[2] One instance, that of the bombardment of Valparaiso by Admiral Nuñez, has no doubt occurred, in which a commercial town has been attacked as a simple act of devastation, but the act gave rise to universal indignation at the time, and has never been defended.

[3] Of course nothing which is above said has reference to the destruction of property capable of being used by an enemy in his war. No objection can be taken to the bombardment of shipbuilding yards in which vessels of war or cruisers can be built. Of course, also, a belligerent is not responsible for devastation caused by, say, the accidental spreading of a fire to a town from vessels in harbour burnt because of their possible use as transports, or from burning naval or military stores.

lasted, as has been seen, till the beginning of the present century. For the present however it is sanctioned by usage; and it was largely resorted to during the Franco-German war of 1870. [At the Hague Conference an endeavour was made to keep the effects of bombardment within as narrow limits as are consistent with accepted modern usage. In the first place, the bombardment of undefended towns, villages and dwellings is absolutely forbidden. In the case of bombardment which does not form part of a general assault or storm, the officer commanding the besiegers is bound to notify his intention, to the best of his power, to the authorities of the town. In bombardments and sieges generally every possible care is to be taken to spare churches and buildings set apart for objects of art, science, or benevolence, as well as hospitals and places where the sick and wounded are sheltered, provided that they are not used for military purposes and that they are designated by special marks visible to the besiegers and communicated to them beforehand. This connexion, it must be remembered, refers only to land warfare, and leaves untouched the question of bombardment from the sea [1].]

3. Deceit.

As a general rule deceit is permitted against an enemy; and it is employed either to prepare the means of doing violent acts under favourable conditions, by misleading him before an attack, or to render attack unnecessary, by inducing him to surrender, or to come to terms, or to evacuate a place held by him. But under the customs of war it has been agreed that particular acts and signs shall have a specific meaning, in order that belligerents may carry on certain necessary intercourse; and it has been seen that persons and things associated with an army are sometimes exempted from liability to attack for special reasons. In these cases an understanding evidently exists that particular acts shall be done, or signs used, or characters assumed, for the appropriate purposes only; and it is consequently forbidden to employ them in deceiving an enemy. Thus information must not be surreptitiously obtained under the shelter of a flag of truce, and the

[1] [Hague Convention on the laws and customs of war, articles 35, 36, 37.]

bearer of a misused flag may be treated by the enemy as a spy; buildings not used as hospitals must not be marked with a hospital flag; and persons not covered by the provisions of the Geneva Convention must not be protected by its cross[1].

A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognised before attacking, and

[1] Vattel, liv. iii. §§ 177-8; Halleck, ii. 25; Bluntschli, § 565; American Instruct., arts. 101, 114, 187; Project of Declaration of Brussels, art. 13; Manuel de l'Inst. de Droit Int., art. 8.

Occasionally stratagems are criticised upon grounds which imply some confusion of mind. In the year 1800 an English squadron is said to have seized a Swedish galliot on the high seas near Barcelona, and put a force of soldiers and marines on board, which under cover of the apparent innocence of the vessel was able to surprise and mainly contribute to the capture of two Spanish frigates lying in the roads. As is very frequently the case with occurrences which are made the subject of animadversion against England in foreign works on international law, owing to a too common neglect to compare the English with the foreign sources of information, the true facts were wholly different from those alleged. No ruse was employed, and the Swedish vessel had nothing to do with the attack (James's Naval Hist. iii. 50). Assuming the facts however to be correctly stated by M. Ortolan (Dip. de la Mer, liv. iii. ch. i), it would be interesting to know how he and M. Calvo (§ 2063) could separate the case from that of a vessel flying, as she is confessedly at liberty to do, false colours until the moment before firing her first gun. It is not pretended that the Swedish galliot was laid alongside the frigates and that the boarding was effected from her, nor that a single shot was fired from her; yet the English are accused of 'treason towards the enemy.' It seems pretty clear that the writers quoted must have allowed themselves to be influenced by the fact that the vessel was really Swedish, although the impression produced upon the minds of the Spanish commanders was entirely independent of this circumstance. However distinctly Swedish the galliot may have been in build and rig, she might have become British property by condemnation for carriage of contraband or breach of blockade. She would then have been an English ship using the legitimate ruse of flying the Swedish flag, and the Spaniards had no means of knowing that this was not actually the case. MM. Ortolan and Calvo point out rightly, on the assumed facts, that a gross breach of neutrality was committed; but as between the two enemies, the breach of neutrality would have had no bearing on the character of the acts done, and the deception effected would have been of a perfectly legitimate kind.

that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell. The rule, disobedience to which is considered to entail grave dishonour, has been based on the statement that 'in actual battle, enemies are bound to combat loyally and are not free to ensure victory by putting on a mask of friendship.' In war upon land victory might be so ensured, and the rule is consequently sensible; but at sea, and the prohibition is spoken of generally with reference to maritime war, the mask of friendship no longer misleads when once fighting begins, and it is not easy to see why it is more disloyal to wear a disguise when it is obviously useless, than when it serves its purpose [1].

Spies.

A spy is a person who penetrates secretly, or in disguise or under false pretences, within the lines of an enemy for the purpose of obtaining military information for the use of the army employing him. Some one of the above indications of intention being necessary to show the character of a spy, no one can be treated as such who is clothed in uniform, who whether in uniform or not has accidentally strayed within the enemy's lines while carrying despatches or messages, or who merely endeavours to traverse those lines for the purpose of communicating with a force beyond or of entering a fortress.

It is legitimate to employ spies; but to be a spy is regarded as dishonourable, the methods of obtaining information which are used being often such that an honourable man cannot employ them. A spy, if caught by the enemy, is punishable after trial by court-martial with the ignominious death of hanging; though, as M. Bluntschli properly remarks, it is only in the more dangerous cases that the right of inflicting death should be acted upon, the penalty being in general out of all proportion with the crime [2].

[1] Ortolan, liv. iii. ch. i; Pistoye et Duverdy, i. 231-4; Bluntschli, § 565. Lord Stowell (The Peacock, iv Rob. 187) in stating the rule gives a different reason for it from that mentioned above, but it is one that is not applicable to all cases.

[2] Bluntschli, §§ 628-32, 639; American Instruct., &c., arts. 88, 99, 100; Projet

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Together with spies, as noxious persons whom it is permitted to execute, but differing from them in not being tainted with dishonour, and so in not being exposed to an ignominious death, are bearers of despatches or of verbal messages, when found within the enemy's lines, if they travel secretly or, when soldiers, without uniform, and persons employed in negotiating with commanders or political leaders intending to abandon or betray the country or party to which they belong.

Persons in balloons.

A strong inclination was shown by the Germans during the war of 1870 to treat as spies persons passing over the German lines in balloons. 'All persons,' says Colonel Walker in writing to Lord Granville, 'who attempt to pass the Prussian outposts without permission, whether by land, water or air,' were 'deported to Prussia under suspicion of being French spies;' and it was declared by Count Bismarck, in writing of an English subject captured in a balloon, that apart from the fact that he was suspected to be the bearer of illicit correspondence, his arrest and trial by court-martial 'would have been justified, because he had spied out and crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained, to our prejudice.' As a matter of fact, though persons captured from balloons were in no case executed as spies, they were treated with great severity. A M. Verrecke, for example, dropped with some companions in Bavaria, and was of course captured; the whole party were sent to a military prison, and only liberated two months after the signature of peace. A M. Nobécourt had his balloon fired upon, and when subsequently captured, he was condemned to death; the sentence was commuted to fortress imprisonment at Glatz. Neither secrecy, nor disguise, nor pretence being possible to persons travelling in balloons, the view taken by the Germans is inexplicable; and it is satisfactory

d'une Déclaration, &c., arts. 19 and 22; Manuel de Droit Int. à l'Usage, &c., p. 32; Manuel de l'Inst. de Droit Int., arts. 23-6. [Hague Convention, arts. 29-31.]

to notice that the treatment of balloon travellers as spies [is forbidden in the Hague Convention], and that their right to be treated as prisoners of war is affirmed in the French official manual for the use of military officers [1].

A person punishable as a spy, or subject to penalties for the other reasons mentioned above, cannot be tried and punished or subjected to such penalties if after doing the punishable act he has rejoined the army by which he is employed before his arrest is effected [2].

[1] Parl. Papers, 1871, lxxii; Journal de Droit Int. Privé, xviii. 442; Projet d'une Déclaration, &c., art. 22; Manuel à l'Usage, &c., p. 40. See also the Manuel de l'Inst. de Droit Int., art. 21. [Hague Convention, art. 29.]

[2] [Hague Convention, art. 31.]

CHAPTER VIII

NON-HOSTILE RELATIONS OF BELLIGERENTS

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General character of non-hostile relations.

UNDER the modern customs of war belligerents are brought from time to time into non-hostile or quasi-amicable relations with each other, which impose obligations, and for the due establishment of which certain formalities are required. These relations sometimes consist in a temporary cessation of hostility towards particular individuals, who are protected by flags of truce, passports, safe-conducts, or licences; or towards the whole or part of the armed forces of the enemy under suspensions of arms, truces, or armistices; and sometimes in the partial abandonment of the rights of hostility under cartels and agreements for capitulation. As hostility ceases in so far as these relations are set up, the arrangements which are made under them proceed upon the understanding that they will be carried out with the same good faith which one nation has a right to demand from another in time of peace, and therefore both that no attempt will be made to use them as a cover for acts not contemplated by them, and that on the other hand the enemy will be given the full benefit of their expressed or implied intention.

Flags of truce.

A flag of truce is used when a belligerent wishes to enter into negotiations with his enemy. The person charged with the negotiation presents himself to the latter accompanied by a drummer or a bugler and a person bearing a white flag. As belligerents have the right to decline to enter into negotiations they are not obliged to receive a flag of truce; but the persons bearing it are inviolable; they must not therefore be turned back by being fired upon, and any one who kills or wounds them intentionally is guilty of a serious infraction of the laws of war. If however they present themselves during the progress of an

engagement, a belligerent is not obliged immediately to put a stop to his fire, the continuance of which may be of critical importance to him, and he cannot be held responsible if they are then accidentally killed. If the enemy receives persons under the protection of a flag of truce he engages by implication to suspend his war with respect to them for so long as the negotiation lasts; he cannot therefore make them prisoners, and must afford them the means of returning safely within their own lines; but a temporary detention is permissible if they are likely to be able to carry back information of importance to their army [and *à fortiori* if they are convicted of actually doing so]. Effectual precautions may always be taken to hinder the acquisition of such knowledge; bearers of flags of truce may for example be blindfolded, or be prevented from holding communication with other persons than those designated for the purpose of having intercourse with them.

It is a necessary consequence of the obligation to conduct the non-hostile intercourse of war with good faith, that a belligerent may not make use of a flag of truce in order to obtain military information; and though its bearer is not expected to refrain from reporting whatever he may learn without effort on his own part, any attempt to acquire knowledge surreptitiously exposes him to be treated as a spy. Deserters, whether bearing or in attendance upon a flag of truce, are not protected by it; they may be seized and executed, notice being given to the enemy of the reason of their execution [1].

Passports. Passports are written permissions given by a belligerent to subjects of the enemy whom he allows to travel without special restrictions in the territory belonging to him or under his control.

[1] American Instruct., arts. 101–12; Manuel de l'Inst. de Droit Int., arts. 27–31; Calvo, § 2128; Bluntschli, §§ 681–4; Halleck, ii. 361; Washington's Corresp. v. 341–2. [Hague Convention, arts. 32–34. It should be noted that the Convention is silent as to the right of treating as a spy the bearer of a flag who abuses his position by obtaining military information, and merely authorises a temporary detention. The envoy who has been proved beyond all doubt to have taken advantage of his privileged position to commit an act of treachery 'loses his rights of inviolability.']

Safe-conducts are like permissions under which persons to whom they are granted may come to a particular place for a defined object. Passports, being general, must be given by the government or its duly appointed agents; safe-conducts may be conceded either by the government or by any officer in military or naval command in respect of places within his district, but in the latter case they may be rescinded by a higher authority; and both passports and safe-conducts may be annulled by the person who has given them, or by his superior, whenever owing to any change of circumstances their continued use has in his judgment become dangerous or inconvenient. When this is done, good faith obviously requires that the grantee who has placed himself in the grasp of his enemy under a promise of immunity shall be allowed to withdraw in safety; it is not necessary however that he shall be permitted to retire in a direction chosen by himself if he has a passport, or in that contemplated by his safe-conduct; his destination and his route may be fixed for him. Neither passports nor safe-conducts are transferable. When they are given for a certain time only, but from illness or other unavoidable cause the grantee is unable to withdraw from the hostile jurisdiction before the end of the specified term, protection must be extended to him for so long as is necessary; if, on the other hand, he voluntarily exceeds prescribed limits of time and place he forfeits the privileges which have been accorded to him, and he may be punished severely if it can be shown that he has taken advantage of the indulgence which he has received for improper objects[1].

Suspensions of arms and armistices.

Agreements for the temporary cessation of hostilities are called suspensions of arms when they are made for a passing and merely military end and take effect for a short time or within a limited space; and they are called truces or armistices when

[1] Halleck, ii. 351; Calvo, §§ 2111-4; Bluntschli, §§ 675-8. An Act of Congress passed in 1790 exposes any civilian violating a passport or safe-conduct to imprisonment for three years and a fine of indeterminate amount, and sends soldiers before a court-martial.

they are concluded for a longer term, especially if they extend to the whole or a considerable portion of the forces of the belligerents, or have an entirely or partially political object[1].

As neither belligerent can be supposed in making such agreements to be willing to prejudice his own military position, it is implied in them that all things shall remain within the space and between the forces affected as nearly as possible in the condition in which they were at the moment when the compact was made, except in so far as causes may operate which are independent of the state of things brought about by the previous operations; the effect of truces and like agreements is therefore not only to put a stop to all directly offensive acts, but to interdict all acts tending to strengthen a belligerent which his enemy apart from the agreement would have been in a position to hinder. Thus in a truce between the commander of a fortress and an investing army the besieger cannot continue his approaches or make fresh batteries, while the besieged cannot repair damages sustained in the attack, nor erect fresh works in places not beyond the reach of the enemy at the beginning of the truce, nor throw in succours by roads which the enemy at that time commanded; and in a truce between armies in the field neither party can seize upon more advanced positions, nor put himself out of striking distance of his enemy by retreat, nor redistribute his corps to better strategical advantage. But in the former case the besieged may construct works in places hidden from or unattainable by his enemy, and the besieger may receive reinforcements and material of war; and in the latter case magazines may be replenished and fresh troops may be brought up and may occupy any position access to which could not have been disputed during the progress of hostilities. During the continuance of a truce covering the whole forces of the respective

[1] It is hardly possible to draw a clear line of distinction between suspensions of arms, truces, and armistices, though in their more marked forms they are readily to be distinguished. See Vattel (liv. iii. ch. xvi. § 233), Halleck (ii. 342–7), Bluntschli (§§ 688–9), and Calvo (§ 2130).

states a belligerent may still do all acts, within such portion of his territory as is not the theatre of war, which he has a right to do independently of the truce; he may therefore levy troops, fit out vessels, and do everything necessary to increase his power of offence and defence [1].

Revictualling of a besieged place.

Whether the revictualling of a besieged place should be permitted as of course during the continuance of a truce is a question which stands somewhat apart. The introduction of provisions is usually mentioned by writers as being forbidden in the absence of special stipulations whenever the enemy might but for the truce have prevented their entrance; there can be no doubt that the same view would be taken by generals in command of a besieging army [2]; and as it is not in most cases possible to introduce trains of provisions in the face of an enemy, the act of doing so under the protection of a truce might at first sight seem to fall naturally among the class of acts prohibited for the reason that apart from the truce they could not be effected. It is however in reality separated from them by a very important difference. Provisions are an exhaustible weapon of defence, the consumption of which, unlike that of munitions of war, continues during a truce or armistice; the ultimate chances of successful resistance are lessened by every ration which is eaten,

[1] The principle of the law regulating acts permitted during a truce was very early recognised; see Albericus Gentilis, De Jure Belli, lib. ii. c. 13. The modern doctrine on the subject is given by Halleck (ii. 345), Bluntschli (§§ 691-2), Calvo (§ 2136). The American Instructions for Armies in the Field (§ 143) regard it as an open question whether the garrison of a besieged town has a right to repair breaches and throw up new works, irrespectively of whether the enemy could have prevented them if hostilities had continued. Heffter however (§ 142) seems to be the only modern writer who is inclined to give this advantage to a garrison, and it is difficult to see what reasons could be alleged in its favour. Nevertheless to avoid possible disputes it may be worth while, in accordance with the direction given in the American Instructions, to make a special stipulation on the subject.

[2] Halleck, ii. 345; Wheaton, Elem. pt. iv. ch. ii. § 22; Calvo, § 2137. The consideration that a belligerent may intend to reduce the besieged places by famine seems to weigh with the latter; but the essence of a truce is that all forms of hostile action are suspended, and the continuance of steps taken towards an ultimate reduction by famine is necessarily a continuance of hostile action.

and to prohibit their renewal to the extent to which they are consumed is precisely equivalent to destroying a certain number of arms for each day that the armistice lasts. To forbid revictualment is therefore not to support but to infringe the principle that at the end of a truce the state of things shall be unchanged in those matters which an enemy can influence. Generally no doubt armistices contain special stipulations for the supply of food by the besieger, or securing the access of provisions obtained by the garrison or non-combatant population under the supervision of the enemy, who specifies the quantity which may from time to time be brought in[1]. The view consequently that revictualling is not a necessary accompaniment of a truce is rarely of practical importance; but as a belligerent cannot be expected to grant more favourable terms to his enemy than can be demanded in strict law, if he sees advantage in severity he will be tempted to refuse to allow provisions to be brought into an invested place, if he is strong enough to impose his will, whenever the starvation of the garrison and the inhabitants is likely to influence the determination of his adversary. A case in point is supplied by the refusal of Count Bismarck in November, 1870, to allow Paris to receive sufficient food for the subsistence of the population during an armistice of twenty-five days' duration which it was then proposed to conclude in order that an Assembly might be elected competent to decide upon the question of making peace[2]. There can be no question that

[1] By the Armistice of Treviso in 1801 Mantua was to be revictualled from ten days to ten days with a fixed amount of provisions for the garrison; the inhabitants were to be at liberty to bring in supplies for themselves, but the French army was to be free to take measures to prevent the quantity exceeding the daily consumption (De Martens, Rec. vii. 294); by that of Pleiswitz in 1813 the fortresses held by the French were to be revictualled every five days by the commanders of the investing troops. A commissary named by the commandant of each of the besieged places was to watch over the exactness of the supply (id. Nouv. Rec. i. 584).

[2] M. de Chaudordy in a circular addressed to the French diplomatic agents abroad thus expresses his view of the principle of law affecting the matter. While I do not think that the law is in conformity with his views, there can be no question that it ought to be so. 'Dans la langue du droit des gens, les

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a rule permitting revictualment from day to day, or at short intervals, under the supervision of the besieger, unless express stipulations to the contrary were made, would be better than that at present recognised. Besides being more equitable in itself, it would strengthen the hands of the besieged, or in other words the weaker party, in negotiation.

Truces which affect a large area.

When a truce affects a considerable area it is not always possible at once to acquaint the whole forces on both sides with the fact that it has been concluded; it is therefore usual to fix different dates for its commencement at different places, the period allowed to elapse before it comes into force at each place being proportioned to the length of time required for sending information. It sometimes happens in spite of this precaution when it is taken, and even when, a limited area being affected, the armistice begins everywhere at the same moment, that acts of hostility are done in ignorance of its having commenced. In such cases no responsibility is incurred by the belligerent who has unintentionally violated the truce on account of destruction of life or property, unless he has been remiss in conveying information to his subordinates; but prisoners and property which have been captured are restored, and partial truces or capitulations made by detached forces which are at variance with the terms of the wider agreement are annulled. Ignorance is considered to exist until the receipt of official notification; if therefore one of the belligerents at a given spot receives notification sooner than the other, and communicates his knowledge to his enemy, the latter is not bound to act upon the information

termes ont une valeur qu'on ne peut pas dénaturer, et le principe d'un armistice accepté par M. de Bismarck implique nécessairement, quand il est question d'une place assiégée, le ravitaillement de cette place. Ce n'est pas là un objet de libre interprétation, mais bien une conséquence naturelle de l'expression même dont on s'est servi et que nous ne pouvions entendre dans un autre sens que celui qui est universellement adopté. Pour tous les peuples en effet, la condition du ravitaillement est implicitement contenue dans le principe de l'armistice, puisque chaque belligérant doit se trouver, à la fin de la suspension d'hostilités, dans l'état où il se trouvait au commencement.' D'Angeberg, Rec. No. 758.

which is presented to him, or before acting may require rigorous proof of its correctness[1].

In the absence of special stipulations the general prohibition of commercial and personal intercourse which exists during war remains in force during an armistice.

Persons competent to conclude truces.

All commanding officers may conclude suspensions of arms with a view to burying the dead, to have time for obtaining permission to surrender, or for a parley or conference; for longer periods and larger purposes officers in superior command have provisional competence within their own districts, but armistices concluded by them cease to have effect if not ratified by the supreme authority, so soon as notice of non-ratification is given to the enemy; agreements for an armistice binding the whole forces of a state are obviously state acts, the ordinary powers of a general or admiral in chief do not therefore extend to them, and they can only be made by the specially authorised agents of the government[2].

Termination of a truce.

Truces and like agreements are sometimes made for an indefinite, but more commonly for a definite, period. In the former case the agreement comes to an end on notice from one of the belligerents, which he is sometimes required to give at a stated time before the resumption of hostilities; in the latter case provision is sometimes made for notice to be given a certain number of days before the date fixed, and sometimes the truce expires without notice[3]. Disregard of the express or tacit conditions of a truce releases an enemy from the obligation to

[1] Vattel, liv. iii. ch. xvi. § 239; Halleck, ii. 344; American Instruct., art. 139; Bluntschli, § 690; Calvo, § 2143.

[2] Halleck, ii. 342; American Instruct., art. 140; Calvo, § 2134. See also Bluntschli, § 688.

[3] For examples see De Martens, Rec. vii. 76, 291, and Nouv. Rec. i. 583. An omission to state the hour at which hostilities are to recommence upon the terminal day, or an ambiguity in the indication of the day itself, might lead to serious consequences; it is therefore usual in modern armistices and truces to mark with precision the moment at which they are intended to expire. For opinions as to the manner in which lax phraseology should be construed, see Vattel, liv. iii. ch. xvi. § 244; Calvo, § 2145.

observe it, and justifies him in recommencing hostilities, without notice if the violation has clearly taken place by the order or with the consent of the state, or in case of doubt after a notice giving opportunity for the disavowal and punishment of the delinquent. Violation of the terms of a truce by private persons, acting on their own account, merely gives the right to demand their punishment, together with compensation for any losses which may have been suffered[1].

Cartels.

Cartels are a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility shall be carried out. They provide for postal and telegraphic communication, when such communication is allowed to continue, for the mode of reception of bearers of flags of truce, for the treatment of the wounded and prisoners of war, for exchange and the formalities attendant on it, and for other like matters. Whether postal or telegraphic communication is forbidden or allowed is a subject upon which the belligerents decide purely in accordance with their own convenience, and the principles and usages which govern the treatment of bearers of flags of truce and of wounded combatants and the exchange of prisoners have been already stated.

Cartel ships.

Hence the only points which now require notice are any special practices with regard to details which may not have been mentioned, and such practices exist only in the case of vessels, called cartel ships, which are employed in the carriage by sea of exchanged prisoners. These are subjected to a few rules calculated to secure that they shall be used in good faith.

[1] Vattel (liv. iii. ch. xvi. § 242) and Bluntschli (§§ 695–6) give the right of recommencing hostilities without notice whenever a private person is not the delinquent. The proposed Declaration of Brussels would only have given the right to denounce the armistice even when an infraction by the state had clearly taken place. [Articles 36–41 of the Hague Convention deal with Armistices, but they throw little light on the questions discussed in the text or on the established practice.]

A cartel ship sails under a safe-conduct given by an officer called a commissary of prisoners, who lives in the country of the enemy, and she is protected from capture or molestation, both when she has prisoners on board, and when she is upon a voyage to fetch prisoners of her own country or is returning from handing over those belonging to the enemy. This protection does not extend to a voyage undertaken from one port to another within the territory of the cartel ship for the purpose of taking prisoners on board at the latter place for conveyance to the hostile territory; and it is lost if she departs from the strict line of the special purpose for which she is used, or gives reason to suspect that she intends to do so. Thus she may not carry merchandise or passengers for hire, a fraudulent use must not be made of her to acquire information or to convey persons noxious to the enemy, and she must not be in a condition to exercise hostilities[1].

Capitulations.

A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions. The arrangement is a bargain made in the common interest of the contracting parties, of which one avoids the useless loss which is incurred in a hopeless struggle, while the other, besides also avoiding loss, is spared all further sacrifice of time and trouble and is enabled to use his troops for other purposes. Hence capitulations vary greatly in their conditions, according to the amount of the generosity shown by the victors, and more frequently according to the extent to which the power of the surrendering force to prolong resistance enables it to secure favourable terms. The force surrendering may become prisoners of war, certain indulgences only being promised to it or to the inhabitants of a place falling by its surrender into the hands of the victors; as when the right of being released upon parole is reserved to such officers as choose to receive their personal freedom, or when provision is made for

[1] Calvo, §§ 2117–9; The Daifje, iii Rob. 141–3; The Venus, ib. iv. 357–8; Admiralty Manual of Prize Law (Holland), 1888, pp. 11–12. The privileges of cartel ships have been accorded to vessels sailing under an understanding with a commanding officer, even though unprovided with formal documents, when the *bona fides* of the employment has been clear. La Gloire, v Rob. 192.

the security of privileges of the inhabitants during the continuance of hostilities. Under more honourable forms of capitulation the garrison of a besieged fortress marches out with the honours of war, leaving the place and the warlike material contained in it in the hands of the enemy, but itself proceeding to the nearest posts of its own army; or a portion of territory and the magazines within it are yielded on condition of the force holding it being sent home with or without arms, and subject to or free from an engagement not to serve for the remainder of the war[1].

Persons competent to conclude them.

In so far as capitulations are agreements of a strictly military kind, officers in superior or detached command are as a general rule competent to enter into them. But stipulations affecting the political constitution or administration of a country or place, or making engagements with respect to its future independence, cannot be consented to even by an officer commanding in chief without the possession of special powers; and a subordinate commander cannot grant terms without reference to superior authority, under which the enemy gains any advantage more solid than permission to surrender with forms of honour. In the one case it is evident that the functions belonging to officers commanding in chief in virtue of their employment are exceeded; in the other, as forces excluded from the control of the subordinate officer may be so placed when the agreement is arrived at, or may be intended so to move, as to render it unnecessary to give any better conditions than those least favourable to the enemy, the officer conceding advantageous terms necessarily oversteps the limits of his military competence. Capitulations therefore which include articles of such nature are void unless they are ratified by the state or commander-in-chief on the side of the

[1] Wheaton, Elem. pt. iv. chap. ii. § 24; Halleck, ii. 348; Bluntschli, §§ 697–9. The capitulation of Sedan, which was the type to which most capitulations conformed during the war of 1870, that of Belfort, and the Convention of Cintra, may serve as examples of the different varieties mentioned in the text. See D'Angeberg, Nos. 392 and 1096; Wellington Despatches, iv. 127. For other specimens see Moser's Versuch, ix. ii. 160, 162, 176, 193, 206, 224; Washington's Correspondence, viii. 533.

officer accepting the surrender, and unless the party surrendering is willing on the arrival of the ratification to carry out his agreement.

Capitulation of El Arisch.

The capitulation of El Arisch in 1800 is an instance which illustrates the working of this rule. In December, 1799, General Kleber, who had been placed by Buonaparte at the head of the French army in Egypt, finding that he had no prospect of maintaining himself permanently in the country, made proposals for a capitulation to the Grand Vizier, who was advancing through Syria, and to Sir Sidney Smith, who acted upon the coast as commodore under the orders of Lord Keith, the admiral in command of the Mediterranean fleet. Sir Sidney Smith, believing that his government would be fully satisfied by any agreement under which the retirement of the French from Egypt was secured, consented that they should go to France, and be transported thither with their arms, baggage, and other property; and on the 24th January, 1800, he signed a convention to that effect. On the previous 17th December, however, orders had been sent to Lord Keith instructing him not to agree to any capitulation unless the French forces surrendered themselves prisoners of war, and the orders were repeated to Sir Sidney Smith on the 8th January. At the time therefore when he granted terms which were beyond his competence as a subordinate commander, because they protected the enemy against a force which was not under his control, orders had actually been received by his superior officer prohibiting him from concluding any arrangement of the kind. The British government not being in any way bound by the acts of Sir Sidney Smith, when the instructions sent by it were communicated to General Kleber in March, the latter with entire propriety assumed the agreement to be non-existent, and notwithstanding that Sir Sidney Smith stated his intention of endeavouring to procure its ratification, he immediately recommenced hostilities. The English Cabinet on their part, on hearing of the convention in the same month, while expressing their disapproval of it, directed, as the French

general had supposed Sir Sidney Smith to be sufficiently authorised, that effect should be given to it; but General Menou, who had succeeded to the command before the arrival of their consent, thinking himself strong enough to hold the country, refused to renew the agreement, and it accordingly fell to the ground [1].

Safe-guards.

A safeguard is a protection to persons or property accorded as a grace by a belligerent. It may either consist in an order in writing, or in a guard of soldiers charged to prevent the performance of acts of war. The objects of such protections are commonly libraries, museums, and buildings of like nature, or neutral or friendly property; sometimes they are granted to an enemy as a special mark of respect. When a safeguard is given in the form of soldiers, the latter cannot be captured or attacked by the enemy [2].

Licences to trade.

A licence to trade is sometimes granted by a belligerent state to the subjects of its enemy, either in the form of a general permission to all enemy subjects to trade with a particular place or in particular articles, or of a special permission addressed to individuals to do an act of commerce or to carry on a commerce which is specified in the licence. In both cases all the disabilities under which an enemy labours are removed by the permission to the extent of its scope, so that he can contract with the subjects of the state and enforce his contracts in its courts [3].

The propriety of granting a licence is a question of policy,

[1] De Garden, Hist. des Traités de Paix, vi. 210-14, 288; De Martens, Rec. vii. 1; Alison, Hist. of Europe, chap. xxxiv; Parliamentary History, xxxv. 587-97. The insinuation made by Wheaton (Elem. pt. iv. ch. ii. § 24) that the English government acted in bad faith is inexcusable. His reference to the parliamentary discussions shows that he had, at least at some time, been acquainted with the facts.

[2] Moser, Versuch, ix. ii. 452-6; De Martens, Précis, § 292; Halleck, ii. 353; Calvo, §§ 2115-6.

[3] Halleck, ii. 364 and 374; Usparicha v. Noble, 13 East, 341. According however to Lord Ellenborough in Kensington v. Ingles (8 East, 290) an enemy trader in England cannot sue in his own name, though he can sue through the medium of a British agent or trustee.

and the grant of a privilege exempting from the ordinary effects of war is a high exercise of sovereign power; as a rule consequently licences can only be given by the supreme authority of the state; a general or admiral-in-chief may however concede them to the extent of the needs of the force or district under his command. Thus during the war between the United States and Mexico, supplies being scarce in California and American vessels being wanting on that coast, licences for the import of supplies were issued by the commander of the Pacific squadron and by the military governor of the occupied province. If an officer in command grants licences in excess of his powers, his protection is good as against members of the force under his immediate command, but is ineffectual as against other forces of the state[1].

It is an implied condition of the validity of all licences that an application for them, if made, shall not have been accompanied by misrepresentation or suppression of material facts. A licence, says Lord Stowell, 'is a thing *stricti juris*, to be obtained by a fair and candid representation and to be fairly pursued.' It is not even necessary, in order to invalidate it, that the misrepresentation or suppression shall have been made with intention to deceive; the grant of a licence being a question of policy, it cannot be certain that it would be made under any other circumstances than those disclosed in the application. Thus a licence was held void, although there was no proof of fraudulent intent, in the case of a person who had a house of business in Manchester, and who received leave under the description of a Manchester merchant to import goods into England, upon its being discovered that he had also a house of business in Holland and that he was the exporter from there as well as the importer into England. And in another case, a licence given to a person described as 'Hampe, of London, merchant,' was invalidated on the ground that he was not at the time settled in London, but

[1] Halleck, ii. 366; The Hope, i Dodson, 229.

was only about to go there, and was in fact resident in Heligoland[1].

How they are to be construed.

The objects of a licence and the circumstances in view of which it is given are such that it is not necessary to the interests of the grantor that it shall be construed with literal accuracy, and on the other hand it is necessary that it shall be construed with reference to his intentions entertained, and capable of being supposed by a grantee acting in good faith to be entertained, at the time of gift. The principle therefore, which is applicable to the construction of a licence, is that a reasonable effect must be given to it in view, first, of the general conditions under which licences are granted, and secondly, of the particular circumstances of the case. Applying this principle to the several heads of the persons who may use a licence, the merchandise and means of conveyance which it will cover, the permissible amount of deviation in a voyage, and the time within which it is good, the following may be said.

1. If a licence is granted to a particular person by name, he or his agent may use it for the purposes of his trade; if it be granted to a particular person and others, he may act either as principal or agent, and he need not necessarily have any interest in the property in which trade is carried on under it; if, finally, it be granted to a particular person by name, he is incompetent to act as the agent of other persons, and so in effect to make his personal privilege a subject of transfer and sale[2].

2. When goods in favour of which a licence is given are

[1] The Vriendschap, iv Rob. 98; Klingender v. Bond, 14 East, 484; the Jonge Klassina, v Rob. 297. That in the two latter cases the persons to whom the licences were issued were not enemies does not affect the principle of the decisions.

The fraudulent alteration of a licence destroys its validity, even where the person claiming protection under it is innocent of the fraud. The Louise Charlotte de Guilderoni, i Dodson, 308.

[2] Halleck, ii. 370; Feize v. Thompson, i Taunton, 121; Warin v. Scott, iv Taunton, 605; Robinson v. Morris, v Taunton, 740. When a licence is not granted to specific individuals, but is perfectly general in its terms, the privilege of trade which it grants can be sold. The Acteon, i Dodson, 53.

limited in quantity or specified in character, it is not necessary that there shall be more than a fair general correspondence between the cargo conveyed and the amount and kind permitted; a small excess, that is to say, or small quantities of goods varying somewhat from the description in the licence, or even wholly foreign to it if they are inoffensive in their nature, will not entail condemnation. In the same way immaterial variations in the mode of conveyance are regarded as innocent. Thus when leave was given to import a cargo of brandy from the Charente, and owing to all vessels lying there having been put under an embargo importation from there was impossible, brandy of due quantity, but imported from Bordeaux, and in two small vessels instead of in a single large one, was released [1].

3. As a rule, deviation from a prescribed course entails confiscation. Deviation caused by stress of weather is of course excepted; and it appears that to touch for orders at a port which, though lying out of the prescribed course, is not absolutely interdicted, is permissible [2].

4. The effect of a limitation in time is different when it has reference to the beginning or to the end of a voyage. If a date is fixed as that before which a voyage must begin, the licence is voided if the vessel possessed of the licence has not set sail before the proper time; when, on the other hand, a date is fixed before which the vessel must arrive, stress of weather, delays interposed by the enemy, and other like causes are taken into consideration, and condemnation takes place on account only of delays which cannot be so accounted for [3].

[1] The Vrow Cornelia, Edwards, 350; Halleck, ii. 371–3.

[2] The Manly, i Dodson, 257; The Emma, Edwards, 366.

[3] The Sarah Maria, Edwards, 361; The Æolus, i Dodson, 300; Effurth v. Smith, v Taunton, 329; Williams v. Marshall, vi Taunton, 390.

CHAPTER IX

TERMINATION OF WAR

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Modes in which war may be terminated.

WAR is terminated by the conclusion of a treaty of peace, by simple cessation of hostilities, or by the conquest of one, or of part of one, of the belligerent states by the other.

Effects of a Treaty of Peace in setting up rights and obligations.

The general effect of a treaty of peace is to replace the belligerent countries in their normal relation to each other. The state of peace is set up, and they enter at once into all the rights and are bound by all the duties which are implied in that relation. It necessarily follows that, so soon as peace is concluded, all acts must cease which are permitted only in time of war. Thus if an army is in occupation of hostile territory when peace is made, not only can it levy no more contributions or requisitions during such time as may elapse before it evacuates the country, but it cannot demand arrears of those of which the payment has been already ordered. It is obviously not an exception to this rule that an enemy may be authorised by the treaty of peace itself to do certain acts which, apart from agreement, would be acts of war; such as to remain in occupation of territory until specific stipulations have been fulfilled, or to levy contributions and requisitions if the subsistence of the troops in occupation is not provided for by the government of the occupied district; a state may of course always contract itself out of its common law rights. It can also hardly be said to be an exception that although prisoners of war acquire a right to their freedom by the simple fact of the conclusion of peace, it is not necessary that their actual liberation shall instantaneously take place; their return to their own country may be subordinated to such rules, and they may be so far kept under military surveillance, as may be dictated by reasonable precaution against

misconduct or even by reasonable regard for the convenience of the state by which they have been captured[1].

By the principle commonly called that of *uti possidetis* it is understood that the simple conclusion of peace, if no express stipulation accompanies it, or in so far as express stipulations do not extend, vests in the two belligerents as absolute property whatever they respectively have under their actual control in the case of territory and things attached to it, and in the case of moveables whatever they have in their legal possession at the moment; occupied territory, for example, is transferred to the occupying power, and moveables on the other hand, which have been in the territory of an enemy during the war without being confiscated, remain the property of the original owner. The doctrine is not altogether satisfactory theoretically, but it supplies a practical rule for the settlement of such matters relating to property and sovereignty as may have been omitted in a treaty, or for covering concessions which one or other party has been unwilling to make in words. This advantage could evidently not be claimed by the necessarily alternative doctrine that, except in so far as expressly provided, all things should return to their state before the war[2].

When a stipulation to the latter effect is made it is to be understood, if couched in general terms, to mean only that any territory belonging to one party, which may be occupied by the other party, with the buildings &c. on it, is to be handed back with no further changes than have been brought about by the operations of war, or by acts legitimately done during the course of hostilities. The clause covers neither property which has been appropriated, nor property which has been destroyed or damaged, in accordance with the laws of war[3].

Notwithstanding that treaties only become definitely binding

[1] Vattel, liv. iv. ch. ii. § 19; Halleck, i. 265; Bluntschli, §§ 708, 716, 717; Calvo, §§ 2949, 2953, 2956.

[2] Vattel, liv. iv. ch. ii. § 21; Heffter, § 181; Phillimore, iii. § dlxxxvi; Bluntschli, § 715; Nuestra Señora de los Dolores, Edwards, 60.

[3] Vattel, liv. iv. ch. ii. § 22, and ch. iii. § 31; Phillimore, iii. § dlxxxiv.

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Date from which hostilities cease on conclusion of a treaty.

on the states between which they are made on being ratified, a treaty of peace, whether it be in the form of a definitive treaty or of preliminaries of peace[1], is so far temporarily binding from the date of signature, unless some other date for the commencement of its operation is fixed by the treaty itself, that hostilities must immediately cease. It acts as an armistice, if no separate armistice is concluded[2]. The rule is obviously founded on the fact that the chance in any given case that ratification will be refused is not sufficient to justify fresh attempts on the part of either belligerent to secure a better position for himself at the cost of effusion of blood, and of infliction of misery on the population inhabiting the seat of war.

The exceptional case that a future date is fixed by a treaty for the commencement of peace occurs when hostilities extend to regions with which immediate communication is impossible. Under such circumstances it is usual to make the termination of hostilities depend upon the length of time necessary for sending information that a treaty has been concluded, and to fix accordingly different dates after which acts of war become illegal in different places. When in such cases duly authenticated information reaches a given place before the time fixed for the cessation of hostilities, the question arises whether further hostilities are legitimate, or whether, as a margin of time is only given in order that knowledge may be obtained, they ought at once to be

[1] Preliminaries of peace are an agreement intended to put an end to hostilities at an earlier moment than that at which the terms of a definitive treaty can be settled. They contain the stipulations which are essential to the re-establishment of peace, together sometimes with arrangements having a temporary object; minor points which lie open to discussion or bargain, and details for the settlement of which time is required, being held over for more leisurely treatment. Preliminaries thus constitute a treaty which is binding in every respect so far as it goes, but which is intended to be superseded by a fuller arrangement, and is so superseded when the definitive treaty is signed. For an example of preliminaries and of a definitive treaty of peace see the Preliminaries of Versailles and the definitive Treaty of Frankfurt in D'Angeberg, Nos. 1119 and 1179.

[2] It is the practice to conclude an armistice before signing a treaty of peace; the above rule could therefore seldom, if ever, come into operation, unless as the result of accidental circumstances.

stopped. The latter and reasonable doctrine seems now to be thoroughly accepted in principle; but its value is somewhat diminished by the reservation, which is perhaps necessarily made, that a naval or military commander is not obliged to accept any information as duly authenticated, the correctness of which is not in some way attested by his own government. In the case of the English ship Swineherd, for example, a vessel provided with letters of marque sailed from Calcutta for England before the end of the period of five months fixed by the Treaty of Amiens for the termination of hostilities in the Indian seas, but after the news of peace had reached Calcutta, and after a proclamation of George III, requiring his subjects to abstain from hostilities from the time fixed, and therein mentioned, had been published in a Calcutta paper. The Swineherd had a copy of this proclamation on board. She was captured by the Bellone, a French privateer, without resistance, there being only enough powder on board for signalling purposes. The Bellone had been informed by a Portuguese vessel bearing a flag of truce which had put into the Mauritius, by an Arab vessel, and by an English vessel which she had captured, that peace was concluded; her commander was shown the proclamation in the Gazette extraordinary of Calcutta, and he could see for himself that a privateer, which by the date of the Gazette must have sailed lately from Calcutta, was without powder; so that there was no room to doubt the accuracy of the information given or the good faith of the statement that the intentions of the Swineherd herself were peaceful. The vessel was nevertheless condemned in France as good prize. In a case like this, in which the fact that peace had been concluded was established beyond all possibility of question, the rule that an officer in command of armed forces of his state may disregard all information which is not authenticated by his own government, operates with extreme harshness; and though the right of seizure could scarcely be abandoned, there seems to be no reason for not subsequently restoring ships captured after receipt of information which should turn out in the end to be correct. For most

Case of the Swineherd.

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purposes of war however the rule must be a hard and fast one. The consequences of suspending hostilities upon erroneous information might easily be serious, and if it were once conceded that commanders were ever bound to act upon information not proceeding from their own government, it would be difficult to prevent them from being sometimes misled by information intentionally deceptive[1].

Effects of a treaty of peace with reference to

A treaty of peace has the following effects with reference to acts done before the commencement of the war which it has terminated.

1. Acts done before the commencement of the war.

1. It puts an end to all pretensions, and draws a veil over all quarrels, out of which the war has arisen. It has set up a new order of things, which forms a fresh starting-point, and behind which neither state may look. War consequently cannot be renewed upon the same grounds.

2. It revives the execution of international engagements of a certain kind, when such execution has been suspended by one or both of the parties to a war[2].

3. In a general way it revives all private rights, and restores the remedies which have been suspended during the war—contracts, for example, are revived between private persons if they are not of such a kind as to be necessarily put an end to by war[3], and if their fulfilment has not been rendered impossible by such acts of a belligerent government as the confiscation of debts due by subjects to those of its enemy; the courts also are re-opened for the enforcement of claims of every kind[4].

2. Acts done during the war.

As between the contracting states, a treaty of peace is a final settlement of all matters connected with the war to which it puts an end. If therefore any acts have been done during the course of hostilities in excess or irrespectively of the rights of war under the authority of one of the belligerent states, the enemy state

[1] Kent, Comm. i. 171; Wheaton, Elem. pt. iv. ch. iv. § 5; Heffter, § 183; La Bellone contre le Porcher, Pistoye et Duverdy, i. 149.

[2] See antea, p. 385.

[3] See antea, p. 390.

[4] Wheaton, Elem. pt. iv. ch. iv. § 3; Heffter, § 180.

cannot urge complaints or claims from the moment that a treaty is signed, either on its own behalf or on behalf of its subjects.

It is possible however that ordinary acts of war may have been done without sufficient authority, that wrongful acts may have been done wholly without authority, and that subjects of one of the two belligerent states, without having committed treason, may yet have compromised themselves with their own government by dealings with the enemy. In order to bury the occurrences of the war in oblivion, and to prevent ill-feeling from being kept alive, in order also to protect men who may only have been guilty of a technical wrong, or who may at any rate have been carried away by the excitement of hostilities, and finally in the common interests of belligerents who may be in occupation of an enemy's country, it is understood that persons acting in any of the ways above mentioned are protected by the conclusion of peace from all civil or criminal processes to which they might be otherwise exposed in consequence of their conduct in the war, except civil actions arising out of private contracts, and criminal prosecutions for acts recognised as crimes by the law of the country to which the doer belongs, and done under circumstances which remove them from the category of acts having relation to the war. Actions, for example, can be brought on ransom bills; if a prisoner of war borrows money or runs into debt he may be sued; or if a prisoner of war or a soldier on service commits a common murder he may be tried and punished. The immunity thus conceded is called an amnesty.

Usually, but far from invariably, the rule of law is fortified by express stipulation, and a clause securing an amnesty is inserted in treaties of peace. Though unnecessary for other purposes, it is required as a safeguard for subjects of a state who, having had distinctly treasonable relations with an enemy, are not protected by an amnesty which is only implied[1].

[1] Halleck, i. 258; Bluntschli, §§ 710–12; Calvo, § 2955; Lord Stowell in the Molly, i Dodson, 396; Crawford and Maclean *v.* The William Penn, iii Washington, 491–3, and the cases there cited; and for examples of

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3. Acts of war done subsequently to the conclusion of peace.

Acts of war done subsequently to the conclusion of peace, or to the time fixed for the termination of hostilities, although done in ignorance of the existence of peace, are necessarily null. They being so, the effects which they have actually produced must be so far as possible undone, and compensation must be given for the harm suffered through such effects as cannot be undone. Thus, territory which has been occupied must be given up; ships which have been captured must be restored; damage from bombardment or from loss of time or market, &c., ought to be compensated for; and it has been held in the English courts, with the general approbation of subsequent writers, that compensation may be recovered by an injured party from the officer through whose operations injury has been suffered, and that it is for the government of the latter to hold him harmless. It is obvious, on the other hand, that acts of hostility done in ignorance of peace entail no criminal responsibility [1].

Termination of war by simple cessation of hostilities.

The termination of war by simple cessation of hostilities is extremely rare. Possibly the commonly cited case of the war between Sweden and Poland, which ceased in this manner in 1716, is the only unequivocal instance; though it is likely that if anything

amnesty clauses see the Treaties of Tilsit (De Martens, Rec. viii. 640 and 666), and that of Paris in 1856 (Hertslet, 1254). Some writers, e.g. Vattel (liv. iv. ch. ii. §§ 20, 22), Wheaton (Elem. pt. iv. ch. iv. § 3), and Heffter (§ 180), treat an amnesty as applying to conduct of one belligerent state towards the other, and the language of some of the older treaties stipulates for oblivion of all acts done on the two sides respectively; see, e.g., the Treaty of Teschen (De Martens, Rec. ii. 663).

[1] Halleck, ii. 262–4; Phillimore, iii. § dxviii; Bluntschli, § 709; Calvo, § 2964. In the case of the Mentor, which was an American ship captured off the Delaware by English cruisers, all parties being ignorant that a cessation of hostilities had taken place, Lord Stowell said, 'If an act of mischief was done by the king's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by articles a place or district was put under the king's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize, to show that he had been injured by this breach of the peace, and was entitled to compensation; and if the officer acted through ignorance his own government must protect him;' . . . he is to be 'borne harmless at the expense of that government.' The Mentor, 1 Rob. 183.

had occurred to compel the setting up of distinct relations of some kind between Spain and her revolted colonies in America during the long period which elapsed between the establishment of their independence and their recognition of the mother country, it would have been found that the existence of peace was tacitly assumed. No active hostilities appear to have been carried on later than the year 1825, and no effort was made to hold neutral states or individuals to the obligations imposed by a state of war; but it was not till 1840 that intercourse with any of the Central or South American republics, except Mexico, was authorised by the Spanish government. In that year commercial vessels of the republic of Ecuador were admitted by royal decree into the ports of the kingdom, and at various subsequent times like decrees were issued in favour of the remaining states. It was only however in 1844, three years after commercial relations had been established, that Chile, which was the earliest of the republics except Mexico to receive recognition, was formally acknowledged to be independent; and Venezuela, which was the last, was not recognised till 1850[1].

The inconvenience of such a state of things is evident. When war dies insensibly out the date of its termination is necessarily uncertain. During a considerable time the belligerent states and their subjects must be doubtful as to the light in which they are regarded by the other party to the war, and neutral states and individuals must be equally doubtful as to the extent of their rights and obligations. Nevertheless a time must come sooner or later at which it is clear that a state of peace has supervened upon that of war. When this has arrived, the effects of the informal establishment of peace are identical with those general effects flowing from the conclusion of a treaty which are necessarily consequent upon the existence of a state of peace. Beyond this it is difficult to say whether any effects would be produced. It is at any rate certain that the pretensions which may have given rise to the war cannot be regarded as abandoned, and that

[1] Lawrence, Commentaire, ii. 327.

the quarrel cannot be assumed to have been definitively settled. It would always be open to either side to begin a fresh war upon the same grounds as those which supplied the motive for hostilities in the first instance.

Conquest.

Conquest consists in the appropriation of the property in, and of the sovereignty over, a part of the whole of the territory of a state, and when definitively accomplished vests the whole rights of property and sovereignty over such territory in the conquering state.

When it can be held to be effected.

As in the case of other modes of acquisition by unilateral acts, it is necessary to the accomplishment of conquest that intention to appropriate and ability to keep shall be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation. Ability to keep must be proved either by the conclusion of peace or by the establishment of an equivalent state of things; the conqueror must be able to show that he has solid possession, and that he has a reasonable probability of being able to maintain possession, in the same way and to much the same degree as a political society which claims to be a state must show that it has independence and a reasonable probability of maintaining it. A treaty of peace by which the principle of *uti possidetis* is allowed to operate affords the best evidence of conquest, just as recognition of the independence of a revolted province on the part of the mother country is the best evidence of the establishment of a new state; but possession which is *de facto* undisputed, and the lapse of a certain time, the length of which must depend on the circumstances of the case, are also admitted to be proof when combined; and recognition by foreign states, though in strictness only conclusive, like all other unilateral acts, against the recognising states themselves, affords confirmation which is valuable in proportion to the number and distinctness of the sources from which it springs.

Notwithstanding the necessary uncertainty in the abstract of evidence supplied by possession and recognition, the fact of conquest is generally well marked enough to be unquestioned.

Case of Hesse Cassel.

One instructive modern case however exists in which the conclusiveness of an alleged conquest was disputed. In the beginning of the nineteenth century the Elector of Hesse Cassel held as private property domains within his own territory, and sums lent on mortgage to subjects of other German states. Shortly after the battle of Jena he was expelled from his dominions by French troops, and he did not return until French domination in Germany was put an end to by the battle of Leipzig. For about a year after its occupation Hesse Cassel remained under the immediate government of Napoleon; it was then handed over by him to the newly-formed kingdom of Westphalia, the existence of which was expressly recognised by Prussia and Russia in the Treaty of Tilsit and, through the maintenance of friendly relations, by such other European states as were at peace with France and its satellites. Napoleon intended to effect a conquest, he dealt with the territory which he had entered as being conquered, and was acknowledged by a considerable number of states to have made a definitive conquest. One of his acts of conquest, effected before the transfer of the territory to the kingdom of Westphalia, was to confiscate the private property of the Elector, which, as the latter after his expulsion had taken service in the Prussian army, was seized apparently as that of a person remaining in arms against the legitimate sovereign of the state. However revolting it may be morally that Napoleon should have taken advantage of the position which he had acquired through his own wrong-doing to inflict further injury upon a man whom he had already plundered without provocation, there can be no doubt that if his conquest was complete he was within his strict legal rights. Was then his conquest a complete one? The question was first raised, in a suit brought by the Elector after his return, before the Mecklenburg courts, as creditor of the estate of a certain Count Hahn Hahn. The Count had borrowed money on mortgage from the Elector before his expulsion, and had obtained a release in full from Napoleon on payment of a portion of the debt.

The Elector contested the validity of the discharge. The Mecklenburg court appears not to have given judgment, but to have remitted the matter to the University of Breslau, whence it was successively carried by way of appeal to two other German Universities. The ultimate judgment affirmed the legality of the act of confiscation on the grounds—

1. That the restored government of the Elector could not be regarded as a continuation of his former government, because he had not been constantly in arms against Napoleon during his absence from Hesse Cassel, and because he had been treated by the peaces of Tilsit and Schönbrunn as politically extinct, the kingdom of Westphalia having been recognised as occupying the place of the electorate.

2. That Napoleon had in fact effected a conquest, and consequently had a right as sovereign to confiscate the property of an active enemy of the state.

3. That even if the property of the Elector could have been held to revert with the conclusion of peace, a restored owner, 'according to the letter of the Roman law,' must take his property as he finds it, without compensation for the damage which it may have suffered in the interval [1].

The above judgment appears to have met with very general approval; and though the Congress of Vienna refused to interfere to prevent the resumption by the Elector of alienated domains within the electorate, there is nothing to show that any of the powers represented there considered his action to be right under the circumstances of the particular case; Prussia pronounced herself adversely to it [2]. There can indeed be no doubt that the

[1] Phillimore, pt. xii. ch. vi.

[2] Sir R. Phillimore points to the fact that 'Austria, Prussia, Russia, the Bourbon sovereigns in France and Italy, Sardinia, and the Pope' left undisturbed titles acquired through the intrusive rulers of territory which they had lost during the revolutionary and Napoleonic wars, as confirmatory of the view that the conduct of the Elector was wrong. The conduct of the Elector was no doubt wrong, but the case against him is not made stronger by suggesting inexact analogies. Possession of the territory wrested from Austria, Prussia, and Russia was in all cases confirmed by treaty; the aliena-

title which Napoleon assumed himself to have acquired by conquest became consolidated by lapse of time, and that alienations made in virtue of it were consequently good. It does not follow from this that the confiscation was in the first instance valid. It took place immediately after the conclusion of the treaties of Tilsit. Although it was impossible to suppose that Hesse Cassel would ever be able to shake off the yoke of France for herself, there was nothing in the aspect of Europe to induce the belief that the settlement of Germany then made was a final one; war still continued with England; it was certain that war would sooner or later be renewed on the continent, and it was necessarily uncertain how soon it might arrive; finally, most of the recognitions given to the kingdom of Westphalia were of little value, because they were given by states which were hardly free agents in the matter. In such a state of things time was absolutely necessary to consolidate the conquest. At first Napoleon and those who derived their title from him were merely occupiers with the pretensions of conquerors. But with the lapse of time the character of occupier insensibly changed into that of a true conqueror; and when the fact of conquest was definitively established, it validated retroactively acts which the conqueror had prematurely done in that capacity. It would be idle to argue, in all the circumstances of the case, that possession had not hardened into conquest during the interval between 1806 and 1813[1].

tions made in France were the result, not of foreign conquest, but of internal revolution; and though the case of the Italian States is very much nearer to that of Hesse, it is prevented from being identical by the much greater duration of the foreign intrusion to which they were subjected. The government of Hanover, which was in exactly the same position as Hesse, acted in the same manner as the Elector.

[1] It is sometimes not only very difficult to be sure whether a conquest has in fact been effected, but also to determine what view of the facts, which may be supposed to have constituted a conquest, has in the long run been taken by states interested in forming an opinion, and by the occupied or conquered country itself, after it has been freed from the control of its enemy.

The kingdom of the Netherlands offers a singularly confused instance of

PART III
CHAP. IX
Effects of conquest.

The effects of a conquest are:—

1. To validate acts done in excess of the rights of a military

this kind. In 1795 the republic of the United Netherlands was overrun by French troops, and a republic of the French type, practically dependent on France, was substituted for the government previously existing; in 1806 the republic was converted into a kingdom under Louis Bonaparte; and in 1810 the country was forcibly annexed to France, to which it remained attached until 1814. Whether in the then condition of Europe these four years of union sufficed to effect a conquest in the absence of treaties confirming it may be doubtful; but in 1815 the Netherlands regarded the political existence of Holland as having ended at the date of the annexation; and though the identity of a state is not usually affected by a change of government, it would have been reasonable in the special circumstances of the case to argue that Holland had so lost her separate life at the accession of King Louis as to make it fair to assume that date instead of 1810 as the commencement of French possession. In 1814, however, this view was not taken by the four Great Powers. Article vi of the General Treaty of Peace placed Holland under the Sovereignty of the House of Orange, and provided that it should receive an 'increase of territory;' and the Congress Treaty of the 9th June, 1815, provided that the 'ancient United Provinces of the Netherlands' and the late Belgic Provinces shall form the Kingdom of the Netherlands. Holland was regarded as a state already in existence, which was merely to receive enlargement and a new form of government, and which was to resort to its former name so far as it could do so consistently with its new position as a kingdom. But at the very moment that Holland was reconstituting itself in this manner under the sanction of Europe, it denied the continuity of its existence by regarding a treaty made before the French revolution as annulled by subsequent events. So early as February, 1815, the Dutch Minister at Washington was instructed to open negotiations for a new treaty of commerce upon the basis of the Treaty of 1782, and it is clear from two notes written by Mr. Monroe to him, that he stated the treaty in question to be, in the opinion of the Dutch government, no longer in force. Subsequently the American government, in order to claim compensation for the seizure and confiscation of vessels and cargoes belonging to subjects of the United States under the reign of Louis Bonaparte, urged that the identity of the state had not been changed; and it appears from a despatch of Mr. Adams of the year 1815, that both States at that time were acting on the supposition that the Treaty of 1782 was binding upon them. The government of the Netherlands, in order to meet the American demands, reverted to the view that the treaty had been annulled; and argued that the identity of the state had been destroyed by its incorporation into France. The United States yielded, and abandoned their claims, but without admitting the validity of the argument from incorporation. They simply took the fact that the kingdom of the Netherlands repudiated the continued identity of the state, together with the further facts that the form of government was different, and the territory enlarged, as sufficient ground for supposing that a new state had been created. Hertslet, Map of Europe by Treaty; Wharton, Digest, § 137.

occupant between the time that the intention to conquer has been signified and that at which conquest is proved to be completed[1].

2. To confer upon the conquering state property in the conquered territory, and to invest it with the rights and affect it with the obligations which have been mentioned as accompanying a territory upon its absorption into a foreign state[2].

3. To invest the conquering state with sovereignty over all subjects of a wholly conquered state and over such subjects of a partially conquered state as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the state and are naturalised for external purposes, without necessarily acquiring the full status of subject or citizen for internal purposes[3]. The persons who are so identified with conquered territory that their nationality is changed by the fact of conquest, are of course mainly those who are native of and established upon it at the moment of conquest; to these must be added persons native of another part of the dismembered state, who are established on the conquered territory, and continue their residence there. Correlatively persons native of the conquered territory, but established in another part of the state to which it formerly belonged, ought to be considered to be subjects of the latter.

Difference between the effect of cession and conquest.

In strictness, the effects of a cession, of a treaty concluded on the basis of *uti possidetis*, and of conquest, upon the inhabitants of territory which changes hands at the conclusion of a war are

[1] Halleck, ii. 484; Calvo, § 2162.

[2] See antea, pp. 98, 99, and compare also pp. 91 et seq.

[3] Dana, note to Wheaton's Elem. No. 169; Lord Mansfield in Hall *v.* Campbell, i Cowper, 208. For the position of the inhabitants of a country conquered by the United States, see antea, p. 243, note. For French law and practice, see Fœlix, § 35, and Cogordan, La Nationalité, 2de éd. For the action of the allied powers in 1814, see Lawrence, Commentaire, iii. 192. 'A rule of public law,' it is laid down in a recent American case, 'is that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.' United States *v.* De Repentigny, v Wallace, 260.

identical, though for somewhat different reasons in the three cases. In each case the population is subjected to the sovereignty of the state by which the territory is acquired; but while in the cases of bare conquest, and of conquest confirmed by a treaty grounded on the principle of *uti possidetis*, the sovereignty is simply appropriated by the conquering state, in that of express cession a transfer of it is effected through an act of the state making the cession, by which the members of that state are bound.

It has however been usual in modern treaties to insert a clause securing liberty to inhabitants of a ceded country to keep their nationality of origin[1]. In the case of persons native of, and established in, the ceded territory, and even in the case of persons who are established in, without being natives of, the ceded territory, this liberty is commonly saddled with the condition that they shall retire within the territory remaining to their state of origin, a certain time being allowed to them to arrange their affairs and dispose of landed and other property which they may be unable to take with them[2]. In the most recent treaty

[1] Like provisions sometimes appear in older treaties, e. g. those of Ryswick and Utrecht.

[2] The Treaties of Vienna in 1809 (De Martens, Nouv. Rec. i. 214), of Paris in 1814 (id ii. 9), and of Vienna in 1864 (Nouv. Rec. Gén. xvii. ii. 482) gave six years, that of Frederikshamm in 1809 gave three years (Nouv. Rec. i. 25), and those of Zurich in 1859 (Nouv. Rec. Gén. xvi. ii. 520), of Turin in 1860 (ib. 540), and of Vienna in 1866 (id. xviii. 409) afforded one year. The Treaty of Frankfurt in 1871 conceded liberty of emigration until October 1, 1872 (Nouv. Rec. Gén. xix. 689).

Halleck (ii. 486–7) and Calvo (§ 2164) think that inhabitants of a ceded country have a right of keeping their old allegiance if they choose to emigrate. It is unquestionable that to prevent them from doing so would be harsh and oppressive in the extreme, but as the possession of such a right is inconsistent with the general principles of law, it could only have been established by a practice of which there is certainly as yet no reasonable evidence. In the United States *v.* De Repentigny, already cited, it was expressly laid down that persons choosing to adhere without permission to their former state 'deprive themselves of protection to their property' situated within the conquered portion; and the alienation of the property of the Elector of Hesse Cassel (see antea, p. 567), which, on the assumption that a conquest was effected, has universally been held to be good, would have been illegal if persons have a right to withdraw themselves from an

of cession a more liberal treatment was accorded; natives of Alsace and the ceded districts of Lorraine, who chose to retain their French nationality, though compelled to emigrate, were allowed by the Treaty of Frankfurt to keep their landed property within the ceded territory[1].

Residence in foreign countries being a frequent incident of modern life, withdrawal from a ceded district is not conclusive of the intention of the person withdrawing to reject the nationality of the conquering state. It is therefore usual to exact an express declaration of intention, as a condition of preservation of the nationality of birth, from persons against whom there is a presumption of changed nationality—that is to say, from persons born within the territory and living there, and from persons born within the territory but absent at the date of annexation. There being no such presumption against persons born in another part of the state making the cession, the simple fact of withdrawal is in their case sufficient.

allegiance imposed by conquest, and therefore *à fortiori* by cession. It is of course not to the point that, as between persons adhering to their former state, and removing into it, and that state, the national character of origin is always preserved; the state of origin has no reason for rejecting them or for refusing them the rights of subjects.

It is to be remarked that as the individual has no right of keeping his old allegiance, irrespectively of treaty, he may find that the sovereign, for whom he would wish to elect, declines to accept him as a subject, if the treaty merely gives a right to emigrate and contains no specific stipulation providing for choice of nationality. After 1814 and 1815 the restored monarchy of France considered that 'les habitants des pays annexés à l'Empire Napoléonien n'avaient pas été plus légitimement Français, que l'Empereur n'avait été légitimement souverain de la France.' It was unwilling to add to the Napoleonic element in the population. Accordingly persons emigrating from the restored provinces into France were required to obtain naturalisation as ordinary foreigners. Cogordan, La Nationalité, 2de éd., 333.

[1] It may be pointed out that the treaties usually fail to deal with all the classes of persons which are affected by them, and that their language is often insufficiently precise. Thus the Treaty of Turin left open the position of minors and of natives of Savoy and Nice residing outside their own country; and many delicate questions have arisen upon the construction of the Treaty of Frankfurt. See Cogordan, chap. vii. §§ 5 and 8.

PART IV

CHAPTER I

THE COMMENCEMENT OF WAR IN ITS RELATION TO NEUTRALITY

PART IV
CHAP. I

Notification of the outbreak of war to be made when possible.

It was shown in an earlier chapter that as between belligerents no necessity exists for a notification that war has begun or is about to begin. As between belligerents and neutrals however the case stands differently. As a matter of courtesy it is due to the latter as friends that a belligerent shall not if possible allow them to find out incidentally and perhaps with uncertainty that war has commenced, but that they shall be individually informed of its existence. As a matter of law they can only be saddled with duties and exposed to liabilities from the time at which they have been affected with knowledge of the existence of war; when there is no privity between two persons, one cannot impose duties or liabilities upon the other by doing an act without the knowledge of the person intended to be affected.

Hence it is in part that it has long been a common practice to address a manifesto to neutral states, the date of which serves to fix the moment at which war begins; and it is evident that when practicable the issue of such a manifesto is the most convenient way of bringing the fact of war to their knowledge. Where war breaks out at a moment which is not determined by the respective governments engaged, or by that which has just done acts of war; as for example when it results from conditional orders given to an armed force, or from an act of self-preservation or pacific intervention being regarded as hostile, a manifesto cannot of course be issued before its commencement. But in

such cases a belligerent cannot expect states to take up the attitude of neutrality contemporaneously with the outbreak of hostilities; even when he has reason to think that the existence of war is known it is his clear duty to give every indulgence to neutrals; and where war breaks out through the performance of an act which one of the two parties elects to consider hostile, the date of its commencement, though carried back as between the belligerents to the occurrence of the hostile act, must be taken as against neutrals to be that of the election through which third powers become acquainted with the fact of war. Hence war can never so exist as to throw upon neutrals their ordinary duties and liabilities without opportunity for the issue of a manifesto having arisen; and though to give express notice, whether in that or in any other form, is merely an act of courtesy, because it is the fact of knowledge however acquired which constitutes the ground of neutral duty, it is evident that the omission of notice may be productive of so much inconvenience and even of loss to neutrals, through the doubt in which they may for some time be left, that the issue of a manifesto is as obligatory as an act of courtesy can well be[1].

[1] Cf. however antea, p. 502. What is said above as to the moment from which states, and therefore their subjects, become affected by the consequences of non-neutral actions does not apply to cases in which neutral persons are engaged knowingly or even ignorantly in carrying out a naval or military operation for an intending belligerent.

CHAPTER II

GROWTH OF THE LAW AFFECTING BELLIGERENT AND NEUTRAL STATES TO THE END OF THE EIGHTEENTH CENTURY

Absence of the conception of neutral duty in the Middle Ages.

UNTIL the latter part of the eighteenth century the mutual relations of neutral and belligerent states were, on the whole, the subject of the least determinate part of international usage. At a time when the daily necessities of intercourse had forced nations to work out an at least rudimentary code for neutral trade in time of war, the relations of states themselves remained in a chaos, from which order was very slowly developed.

Throughout the Middle Ages it was neither contrary to habit nor repugnant to moral opinion that a prince should commit, or allow his subjects to commit, acts of flagrant hostility against countries with which he was formally at peace. It may even be said broadly that at the end of the sixteenth century a neutral state might allow the enemy of its ally to levy troops within its dominions, it might lend him money or ships of war, and it might supply him with munitions of war. What the state might do its subjects might also do. The common law of nations permitted a license which was checked only by the fear of immediate war.

Its growth.

But as it was the interest of every one in turn to diminish the wide liberty of action which was exercised by neutral powers, most nations became gradually so bound by treaties on every hand as to make a rough friendliness their standard of conduct. For centuries innumerable treaties, not only of simple peace and friendship, but even of defensive alliance, contained stipulations that the contracting parties would not assist the enemies of the other, either publicly with auxiliary forces or subsidies, or

privately by indirect means. They were also to prevent their subjects from doing like acts[1]. The habits thus formed reacted

[1] The treaties are sometimes couched in general, and sometimes in very specific language. The following may be taken as fairly typical specimens:— In 1502, Henry VII and Maximilian, King of the Romans, agreed 'quod nullus dictorum principum movebit aut faciet etc. guerram etc., nec dabit auxilium, consilium, vel favorem, publice vel occulte, ut hujusmodi guerra moveatur vel excitetur quovismodo.' In 1505, Henry VII and the Elector of Saxony covenanted that neither of the contracting parties 'patrias, dominia, etc. alterius a suis subditis invadi aut expugnari permittet, sed expresse et cum effectu prohibebit et impediet,' and neither of them 'alicui alteri patrias, dominia etc., alterius invadenti etc. consilium, auxilium, favorem, subsidium, naves, pecunias, gentes armorum, victualia aut aliam assistentiam quamcunque publice vel occulte dabit, aut præstari consentiet, sed palam et expresse prohibebit et impediet.'

The following treaties may be cited as giving sufficiently varied examples of the stipulations which were commonly made. It will be observed to how late a period it was necessary to insist upon them:—

I. TREATIES OF DEFENSIVE ALLIANCE.

1465.	Edward IV and Christian I of Denmark	Dumont, Corps Diplomatique	iii. i. 586.
1467.	Edward IV and Henry IV of Castile .	,,	iii. i. 588.
1475.	Charles Duke of Burgundy and Galeazzo Sforza	,,	iii. i. 496.
1475.	Frederic III and Louis XI . . .	,,	iii. i. 521.
1506.	Henry VII and Joanna Queen of Castile	,,	iv. i. 76.
1508.	Henry VII and Joanna Queen of Castile	,,	iv. i. 103.
1510.	Ferdinand King of Aragon and Joanna Queen of Castile	,,	iv. i. 521.
1623.	James I and Michael Federowitz Grand Duke of Russia	,,	v. ii. 437.
1655.	Frederic William of Brandenburg and the United Provinces . . .	,,	vi. ii. 111.

II. TREATIES OF SIMPLE PEACE AND FRIENDSHIP.

1559.	Elizabeth and Mary of Scotland . .	Dumont, Corps Diplomatique	v. i. 29.
1559.	Peace of Château Cambrésis . . .	,,	v. i. 32.
1564.	Elizabeth and Charles IX . . .	,,	v. i. 211.
1610.	Louis XIII and James I . . .	,,	v. ii. 149.
1631.	Louis XIII and the Elector Maximilian of Bavaria	,,	vi. i. 14.

The Treaty of Münster, in 1648, provided that 'alter alterius hostes præsentes aut futuros nullo unquam titulo, vel prætextu, vel ullius controversiæ bellive ratione contra alterum armis, pecunia, milite, commeatu

PART IV
CHAP. II

View of the duty of neutral states taken in the seventeenth century;

upon thought, and men grew willing to admit the doctrine, that what they had become accustomed to do flowed from an obligation dictated by natural law. By the latter half of the seventeenth century it was no longer necessary to stipulate for neutrality in precise language. The neutrality article dwindled into a promise of mutual friendship [1]. But it would be a mistake to infer from this that international practice conformed to the more stringent provisions of former treaties. These had certainly not been observed when a sovereign felt tempted to infringe them; and though thinkers had begun to apply ethics to the conduct of nations, no one had so marked out the principles of neutrality that particular usages could be compared with them and improved with their help. Grotius gave the subject no serious consideration, and went no farther in his meagre chapter 'De his qui in bello medii sunt' than to say that 'it is the duty of those who stand apart from a war to do nothing which may strengthen the side whose cause is unjust, or which may hinder the movements of him who is carrying on a just war; and in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions to the respective armies, and in not assisting persons besieged [2].' Elsewhere he incidentally remarks that 'it is not

by Grotius.

aliterve juvet, aut illis copiis quas contra aliquem hujus pacificationis consortem a quocumque duci contigerit, receptum, stativa, transitum indulgeat.' Dumont, vi. i. 451.

[1] The Peace of the Pyrenees (1659) has merely the general words 'Les Roys, &c., éviteront de bonne foy tant qu'il leur sera possible le dommage l'un de l'autre.' Dumont, vi. ii. 265. Like language is found in the Treaty of Breda, between England and France, in 1667 (Dumont, vii. i. 41); in the Peace of Lisbon, between Spain and Portugal, in 1668 (Dumont, vii. i. 73); in the Treaty of Nymeguen, in 1678 (Dumont, vii. i. 357); and the Peace of Ryswick, in 1697 (Dumont, vii. ii. 389). The treaty between England and Denmark in 1669, and that between the same powers in 1686 (Dumont, vii. i. 127), are exceptions. The contracting parties promise 'se alterutrius hostibus, qui aggressores fuerint, nihil subsidii bellici, veluti milites, arma, machinas, bombardas, naves et alia bello gerendo apta et necessaria subministraturos, aut suis subditis subministrare passuros; si vero alterutrius regis subditi hisce contravenire audeant, tum ille rex, cujus subditi id fecerint, obstrictus erit in eos acerbissimis poenis, tanquam seditiosos et foedifragos animadvertere.'

[2] 'Eorum qui a bello abstinent officium est nihil facere, quo validior fiat is

inconsistent with an alliance that those who are attacked by one of the parties to it shall be defended by the other—peace being maintained in other respects[1].' Various quotations from ancient authors, from which he draws no conclusions, suggest that he looked upon an impartial permission to raise levies as consistent with neutrality, but that the grant of a subsidy or the supply of munitions of war was an hostile act.

Practice of the seventeenth century.

So long as these somewhat incoherent doctrines alone represented the views of theorists it is not strange that usage was in general rude, or that countries concluded treaties with the express object of restricting its operation on themselves. Henry IV allowed entire regiments of French soldiers to pass into the service of the United Provinces; the expedition, numbering 6,000 men, which the Marquis of Hamilton, with the consent of his sovereign, led to the assistance of Gustavus Adolphus in 1631, was exceptional only in its size[2]; and Burnet draws a lively picture of the character of English neutrality at a much later time. In 1677 complaints were made in Parliament 'of the regiments that the King kept in the French army, and of the great service done by them. It is true the King suffered the Dutch to make levies. But there was another sort of encouragement given to the levies of France, particularly in Scotland; where it looked liker a press than a levy. They had not only the public gaols given them to keep their men in, but when these were full, they had the castle of Edinburgh assigned to them, till ships were ready for their transport[3].'

It was important to small and ambitious states, which occupied a larger space in the field of politics than was justified by their

qui improbam fovet causam, aut quo justum bellum gerentis motus impediantur; in re vero dubia aequos se praebere utrisque in permittendo transitu, in commeatu praebendo legionibus, in obsessis non sublevandis.' De Jure Belli et Pacis, lib. iii. cap. xvii.

[1] 'Non pugnat autem cum foedere, ut quos alii offenderent, hi defenderentur ab aliis, manente de caetero pace.' Lib. ii. cap. xvi.

[2] Martin, Hist. de France, x. 497; Burnet, Memoirs of James and William, Dukes of Hamilton, pp. 7 and 9.

[3] Hist. of his own Time, ii. 114 (ed. 1823).

inherent power, to keep their hold on foreign recruiting-grounds. A treaty therefore between Brandenburg and the United Provinces in 1655 declares that 'the levy of land or sea forces, and the purchase, lading, and equipment of vessels of war shall always be permitted, and be lawful, in the lands and harbours of the two parties;' and in 1656 a treaty between England and Sweden provided, more in the interest of the latter than the former power, that it should be 'lawful for either of the contracting parties to raise soldiers and seamen by beat of drum within the kingdoms, countries, and cities of the other, and to hire men of war and ships of burden [1].'

A treaty of neutrality may secure something more, and will certainly provide for nothing less, than the bare performance of strict neutral duties. By that which was concluded between Louis XIV and the Duke of Brunswick in 1675, the Duke promises to observe a 'sincere and perfect neutrality towards the King. . . . In conformity with this neutrality, his Highness will not anywhere assist the enemies of the King directly or indirectly, and will not permit any levies to be made in his states, nor the passage of troops through them, nor the formation of any kind of magazines [2].'

In other words he promises :—

1. That no active assistance shall be given by Brunswick to any enemy of France as by one sovereign state to another.

2. That it will not afford passive aid by permitting enlistments or by allowing its territory to be made a base of operations.

He does not promise to restrain the individual action of his subjects in any way.

It would therefore seem that towards the end of the seventeenth century the utmost that could be demanded by a belligerent

[1] Dumont, vi. ii. 111, and vi. ii. 125. The provision was 'propounded by the ambassador' of Sweden, and six thousand men were levied for Sweden in England. Whitelock's Memorials, 633–6.

[2] Dumont, vii. i. 312.

from a neutral state was that the latter should refrain from giving active help to the enemy of the belligerent, and should prevent his territory from being continuously used for a hostile purpose. Indeed, his customary right to so much as this may have been far from unquestionable; and neither then nor long afterwards had he any good grounds for complaint if privileges given to his enemy could be shared by himself.

It must not however be forgotten that though the practice of neutrality in the seventeenth century was highly imperfect, and though its theory was not thought out, the ethical view of the general relations of states to each other which was commonly taken by writers prepared the way for a more rapid settlement of its fundamental conceptions, when once attention was directed to them, than might otherwise have taken place.

Rights of a neutral state as understood in the seventeenth century.

The right of a sovereign to forbid and to resent the performance of acts of war within his lands or waters was theoretically held as fully then as now to be inherent in the fact of sovereignty[1]. In 1604, James I issued a Proclamation directing that 'all officers and subjects by sea and land shall rescue and succour all such merchants and others as shall fall within the danger of such as await the coasts.' And in 1675, Sir Leoline Jenkins, in writing to the King in Council with respect to a vessel which had been seized by a French privateer, says that 'all foreign ships, when they are within the King's Chambers, being understood to be within the places intended in these directions' of James I, 'must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty[2].' Philip II, so early as 1563, had published an edict forbidding, under pain of death, that any violence should be done to his subjects or allies, whether for reason of war or for any other

[1] 'Alienum territorium securitatem praestat,' says Albericus Gentilis (De Jure Belli, lib. ii. c. 22); it is true that he also says, 'etiam nec puto grave delictum in loco non licito hostes offendisse.'

[2] Wynne, Life of Sir Leoline Jenkins, ii. 780.

cause, within sight of shore. The Dutch, after acquiring their independence, made a like decree [1]; and several treaties exist in which it was stipulated that the rights of sovereignty should be enforced by neutral nations for the benefit of an injured belligerent [2].

How far they were observed.

But the history of the century bristles with occurrences which show how little the doctrine had advanced beyond the stage of theory. In 1627, the English captured a French ship in Dutch waters; in 1631, the Spaniards attacked the Dutch in a Danish port; in 1639, the Dutch were in turn the aggressors, and attacked the Spanish fleet in English waters; again in 1666, they captured English vessels in the Elbe, and in spite of the remonstrances of Hamburg and of several other German states did not restore them; in 1665, an English fleet endeavoured to seize the Dutch East India squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river [3].

In the eighteenth century the principle of sovereignty was on the whole better respected. In 1759, when Admiral Boscawen pursued a French squadron into Portuguese waters and captured

[1] Bynkershoek, Quæst. Jur. Pub., lib. i. c. viii.

[2] Art. xxi of the Treaty of Breda (1667) declares: 'Item, si qua navis aut naves, quae subditorum aut incolarum alterutrius partis aut neutralis alicujus fuerint, in alterutrius portubus a quovis tertio capiantur, qui ex subditis et incolis alterutrius partis non sit; illi, quorum in portu aut ex portu aut quacunque ditione praedictae naves captae fuerint, pariter cum altera parte dare operam tenebuntur in praedictis nave vel navibus insequendis et reducendis, suisque dominis reddendis; verum hoc totum fiet dominorum impensis, aut eorum quorum id interest.' Dumont, vii. i. 47. Like provisions were contained in the treaties made between the United Provinces and England in 1654 and 1661, and France in 1662.

[3] Bynkershoek, op. cit.; Pepys's Diary, Aug. 19, 1665. It is significant of the view which was commonly taken of such acts that Pepys, with evident surprise, speaks of 'the town and castle, *without any provocation*, playing on our ships.' This surprise can have no reference to the agreement which is supposed to have been made by the English with the King of Denmark, for his silence shows that he was ignorant of its existence.

two vessels, the government of Portugal, though perfectly indifferent in fact, was obliged to demand reparation in order to avoid embroilment with France; and as full reparation by surrender of the vessels was not exacted, France subsequently alleged that the neutrality of Portugal was fraudulent, and grounded her declaration of war in 1762 in part upon the occurrence. Progress nevertheless was slow, as is sufficiently testified by the following passage in a memorial respecting a proposed augmentation of the land forces of the United Provinces, which was presented to the States-General by the Princess Regent in 1758. 'This augmentation,' she says, 'is the more necessary, as it behoves the state to be able to hinder either army from retiring into the territory of the state if it should be defeated; for in that case the conqueror being authorised to pursue his enemy wherever he can find him would bring the war into the heart of our own country[1].'

Growth of opinion in the eighteenth century.

In the course of the eighteenth century, opinion ripened greatly as to the due relations of belligerents and neutral states. It was not strong enough to form an adequate or consistent usage; but it adopted a few general principles with sufficient decision to afford the basis of a wholesome rule of conduct. This progress was in part owing to text writers, who formulated the best side of international practice into doctrines, which from their definite shape, and their alliance with natural law, seemed to be clothed with more authority than was perhaps their due, and which soon came to be acknowledged as standards of right.

Bynkershoek.

Bynkershoek was the earliest writer of real importance, and few of his successors have equalled him in sense or insight. In his 'Quæstiones Juris Publici,' written in 1737, he says, 'I call those non-enemies who are of neither party in a war, and who owe nothing by treaty to one side or to the other. If they are

[1] Lord Stanhope's Hist. of England from the Peace of Utrecht, iv. 148, and Append. xxxiv; Ann. Register for 1758, p. 150. Bynkershoek (Quæst. Jur. Pub., lib. i. c. viii) says, 'Ad summum largiendum est, proelio recens commisso, hostem fugientem persequi licere in alterius imperio.'

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under any such obligation they are not mere friends but allies . . . Their duty is to use all care not to meddle in the war . . . If I am neutral, I cannot advantage one party, lest I injure the other . . . The enemies of our friends may be looked at in two lights, either as our friends, or as the enemies of our friends. If they are regarded as our friends, we are right in helping them with our counsel, our resources, our arms, and everything which is of avail in war. But in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give a preference to one party over the other, inconsistent with that equality in friendship which is above all things to be studied. It is more essential to remain in amity with both than to favour the hostilities of one at the cost of a tacit renunciation of the friendship of the other [1].'

Wolff.

Wolff, who wrote in 1749, calls those neutrals 'who adhere to the side of neither belligerent, and consequently do not mix themselves up in the war [2].' They are in a state of amity with both parties, and owe to each whatever is due in time of general peace. Belligerents have therefore the right of unimpeded access to neutral territory, and of buying there at a fair price such things as they may want. This right, it is true, is qualified by the requirement that it shall be exercised for a *causa justa*, but war is a *causa justa*, and therefore the passage of troops is to be permitted.

Vattel.

Vattel, who published his work in 1758, says that neutrality

[1] 'Non hostes appello qui neutrarum partium sunt, nec ex foedere his illisve quicquam debent; si quid debeant, foederati sunt, non simpliciter amici. . . . Horum officium est omni modo cavere ne se bello interponant. . . . Si medius sim, alteri non possum prodesse, ut alteri noceam. . . . Crede amicorum nostrorum hostes bifariam considerandos esse, vel ut amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret ope, consilio, eosque juvare, milite auxiliari, armis et quibuscunque aliis, quibus in bello habent. Quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello praeferremus, quod vetat aequalitas amicitiae, cui in primis studendum est. Praestat cum utroque amicitiam conservare, quam alteri in bello favere, et sic alterius amicitiae tacite renunciare.' Quaest. Jur. Pub., lib. i. c. ix.

[2] Jus Gentium, § 672.

consists in 'an impartial attitude so far as the war is concerned, and so far only; and it requires—1st, that the neutral people shall abstain from furnishing help when they are under no prior obligation to grant it, and from making free gifts of troops, arms, munitions, or anything else of direct use in war. I say that they must abstain from giving help, and not that they must give it equally, for it would be absurd that a state should succour two enemies at the same moment. Besides, it would be impossible to do so equally; the very same things—the same number of troops, the same quantity of arms, of munitions, &c., furnished under different circumstances, are not equivalent succour. 2nd, that in all matters not bearing upon the war a neutral and impartial nation shall not refuse to one of the parties, because of the existing quarrel, that which it accords to the other[1].' Vattel afterwards so far qualifies this sound general statement as to lay down that a country without derogating from its neutrality, may make a loan of money at interest to one of two belligerents, refusing a like loan to the other, provided the transaction between the states is of a purely business character[2]. The qualification is only of importance as tending to show in how narrow a sense Vattel would have been inclined to construe his own words.

It is to be observed that these authors, in dealing with conduct failing to satisfy the obligations of neutrals, speak only of acts done by the state itself with the express object of assisting

[1] 'Un peuple neutre doit garder une impartialité . . . qui se rapporte uniquement à la guerre, et comprend deux choses: 1. Ne point donner de secours quand on n'y est pas obligé; ne fournir librement ni troupes, ni armes, ni munitions, ni rien de ce qui sert directement à la guerre. Je dis ne point donner de secours et non pas en donner également; car il serait absurde qu'un état secourût en même temps deux ennemis. Et puis il serait impossible de le faire avec égalité; les mêmes choses, le même nombre de troupes, la même quantité d'armes, de munitions, etc., fournies en des circonstances différentes ne forment plus de secours équivalents. 2. Dans tout ce qui ne regarde pas à la guerre, une nation neutre et impartiale ne refusera point à l'une des parties, à raison de sa querelle présente, ce qu'elle accorde à l'autre.' Droit des Gens, liv. iii. c. vii. § 104. See also Barbeyrac, note to Pufendorf, bk. viii. c. vi, and Burlamaqui, vol. ii. pt. iv. c. viii.

[2] Liv. iii. c. vii. § 110.

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a belligerent. They say nothing indicating how far in their view a nation was bound to watch over the acts of its subjects; and in practice this doctrine as to state conduct was controlled by the action of treaties.

Practice of the eighteenth century as to troops furnished under treaty by a neutral state to a belligerent.

It was clearly open to a state, without abandoning its position of neutrality, to supply a body of troops to a belligerent under a treaty between the two powers, either for mutual help, or for succour to be given by one only to the other in the event of a war which might be in contemplation by an intending belligerent at the very moment of concluding the treaty. Agreements of this kind were often made, and were sometimes guarded against by express stipulation. In 1727, when England was already in a state of informal war with Spain, the Landgrave of Hesse Cassel agreed to provide her with 12,000 troops 'whenever they should be wanted[1].' One of the most marked instances of the practice is furnished by the conduct of the United Provinces during the war of the Austrian Succession. Under their guarantee of the Pragmati Sanction they sent in 1743 an auxiliary corps of 20,000 men to the assistance of Maria Theresa, and they gradually so engaged with their whole force in the active operations of the war that the brilliant campaign of Marshal Saxe in 1746 left them destitute of an army. Nevertheless, when in the next year the French forces entered Holland, a Royal Declaration announced that the invasion was solely intended to put a stop to the effects of the protection given to the English and Austrian armies by the Republic, 'sans rompre avec elle[2].' Piedmont engaged in like manner in the same war; and England in it, as in the Seven Years' War and that of American Independence, drew large bodies of troops from neutral German states under treaty with their sovereign[3]. Bynkershoek says, 'What if I have promised help to an ally, and he goes to war with my

[1] Dumont, viii. ii. 141.

[2] Martin, Hist. de France, lib. xcv. § ii.

[3] Lord Stanhope, Hist. of England, vol. iii. 144, vol. iv. 49, and vol. vi. 86; De Martens, Rec. ii. 417 and 422.

friend? I think that I ought to stand by my promise, and that I can do so properly.' The neutral may however abstain when the war has been undertaken unjustly on the part of his ally; and when it is once begun no new engagement must in any case be entered into [1].

It was not until 1788 that the right of a neutral state to give succour under treaty to a belligerent gave rise to serious, if to any, protest. Denmark, while fulfilling in favour of Russia an obligation of limited assistance contracted under treaty, declared itself to be in a state of amity with Sweden. The latter power acquiesced as a matter of convenience in the continuance of peace, but it placed on record a denial that the conduct of Denmark was permissible under the Law of Nations [2]. Probably Sweden stood almost alone in her view as to the requirements of neutral duty. In 1785, the United States agreed with Prussia that 'neither one nor the other of the two states would let for hire, or lend, or give any part of its naval or military forces to the enemy of the other to help it or to enable it to act offensively or defensively against the belligerent party' to the treaty; and in 1780 a similar treaty had been concluded between England and Denmark [3]. It is needless to repeat that positive covenants are not inserted in treaties merely to embody obligations which without them would be of equal stringency; and the continuance of the old practice is proved by the conclusion of a treaty in 1788 under which the Duke of Brunswick contracted to supply Holland with 3,000 men, and of another in the same year with a like object between Holland and Mecklenburg-Schwerin [4].

As to levies in a neutral state made

It is more doubtful whether the levy of troops by belligerents on their own account within neutral territory was still recognised by custom, when allowed apart from treaty to both parties

[1] Quæst. Jur. Pub. lib. i. c. ix.

[2] The declaration and counter declaration are quoted in full by Phillimore, iii. § cxl.

[3] Elliot, American Diplomatic Code, i. 347; Chalmers, Collection of Treaties, i. 97.

[4] De Martens, Rec. iv. 349 and 362.

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indifferently. Bynkershoek says, 'I think that the purchase of soldiers among a friendly people is as lawful as the purchase of munitions of war[1];' they would merely be subject to capture like other contraband articles on their way to the belligerent state. Vattel in somewhat inconsistent language probably intends to give the same liberty[2]. But there are a few treaties to the contrary effect between some of the most important powers. England and Holland were both reciprocally bound with France by the Treaties of Utrecht to prevent their subjects from accepting commissions in time of war from the enemies of whichever might be engaged in hostilities; a treaty of the year 1670 of the same nature was still in force between England and Denmark; and in 1725 Spain entered into a like engagement with the Empire[3]. When troops were wanted they seem to have been generally, if not always, obtained under treaty; England and Holland for municipal reasons enacted laws expressly to restrain their subjects from entering the service of foreign states; and the neutrality edicts of the Two Sicilies in 1778, and of Venice and the Papal States in 1779, forbid enlistment with a belligerent under pain of exile or imprisonment[4]. The old practice may

[1] 'Quod juris est in instrumentis bellicis, idem esse puto in militibus apud amicum populum comparandis.' Quæst. Jur. Pub. lib. i. cap. xxii.

In the usually sensible Derecho Internacional of Pando (written in 1838) is a curious instance of the tendency of a doctrine, once sanctioned by a writer of authority, to perpetuate itself, like an organ which has become useless, and only remains in a rudimentary state to attest an epoch of lower development. He almost repeats the words of Bynkershoek: 'Los hombres deben considerarse como artículo de guerra, en que es libre á todas naciones comerciar de la misma manera que en los otros, y con iguales restricciones' (§ clxxxix). In the particular case the doctrine is too much out of harmony with modern opinion to do mischief; but it is only an unusually glaring example of a common, and—as text writers are quoted in international controversy—a dangerous practice.

[2] Droit des Gens, liv. iii. c. vii. § 110. His qualification that troops may be levied in a neutral state—'à moins qu'elles ne soient données pour envahir les états' of the opposite belligerent, and provided that they are not too numerous—takes away with one hand what he gives with the other.

[3] Dumont, viii. i. 348 and 378; vii. i. 136; and viii. ii. 115.

[4] 9 Geo. II. c. 30 and 29 Geo. II. c. 17. For comments on the intention of these acts, see Debates on the Foreign Enlistment Act, Hansard, xl (1819);

therefore be taken to have fallen into desuetude, and perhaps to have become illegal.

As to cruisers fitted out by neutrals.

The equipment by private adventure of cruisers to be employed under letters of marque in the service of a belligerent is an act analogous to the levy of a body of men in aid of his land force, but from the conditions of marine warfare it is more mischievous to his enemy. A better defined rule might therefore be expected to exist with regard to it. Perhaps, on the whole, this was the case; but the dispute between England and France in 1777 shows that it would be easy to overvalue the significance of facts tending to show such adventures to be illegal under the common law of nations. During the correspondence between the two governments with reference to the covert help afforded to the American insurgents in France, M. de Vergennes admitted that France was bound to prevent ships of war from being armed and manned with French subjects within its territory to cruise against England. But in this instance, and in all the controversy of that time between the two nations, the demands of one party and the admissions of the other were alike based upon obligations under the Treaties of Utrecht and of Paris. It is not probable that England in her frequent Notes and her elaborate 'Mémoire Justificatif' would have refrained from supporting the special obligations of treaties by the authority of general law had she thought that its voice would be distinct enough for her purpose[1].

1777. Dispute between England and France.

De Martens, Rec. iii. 47, 53, 74. Bynkershoek (Quæst. Jur. Pub. lib. i. c. xxii) says that in his day most states permitted their subjects to enter foreign service.

[1] De Martens, Causes Célèbres, iii. 152. The fifteenth article of the Treaty of Commerce of Utrecht declares that 'il ne sera pas permis aux armateurs étrangers, qui ne seront pas sujets de l'une ou de l'autre couronne, et qui auront commission de quelqu'autre Prince ou État ennemis de l'un et de l'autre, d'armer leurs vaisseaux dans les ports de l'un et de l'autre des deux royaumes, d'y vendre ce qu'ils auront pris, . . . ni d'acheter même d'autres vivres que ceux qui leur seront nécessaires pour parvenir au port le plus prochain du Prince dont ils auront obtenu des commissions.' Dumont, viii. i. 348. The stipulations of the Treaty of Utrecht were revived by the Treaty of Paris. The absence of reference to the authority of general law rather than to treaty stipulations is the more significant that the above article evidently fails to cover the acts complained of.

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Yet she had occasion to complain of acts which in the present day would seem to be of extraordinary flagrancy. The Reprisal, an American privateer, sailed from Nantes to cruise against the English. She returned to L'Orient, sold her prizes, and took in reinforcements of men. She then again cruised in company with a privateer which had been armed at Nantes, and was manned solely by Frenchmen; and fifteen ships captured by the two vessels were brought into French ports and sold.

Neutrality edicts.

The evidence tending to show that general opinion already looked upon the outfit and manning of cruisers by private persons as compromising the neutrality of a state, mainly consists in the neutrality edicts which were issued shortly after this time on the outbreak of actual war between England and France. Venice, Genoa, Tuscany, the Papal States, and the Two Sicilies, subjected any person arming vessels of war or privateers in their ports to a fine; and in 1779 the States-General of the United Provinces issued a placard reciting that it was suspected that subjects of the state had equipped and placed on the sea armed vessels under a belligerent flag, and declaring such 'conduct to be contrary to the law of nations, and to the duties binding on subjects of a neutral power[1].'

Neutral duty at the end of the eighteenth century according to De Martens.

Ten years later De Martens summed up the duties of neutrality as follows. 'It is necessary,' he says, 'for the observance of complete neutrality to abstain from all participation in warlike expeditions. . . . But can a power, without overstepping the bounds of neutrality, allow its subjects to accept letters of marque from a belligerent? In strictness, it would seem that it cannot. Treaties of commerce often contain an express promise

[1] De Martens, Rec. iii. 25, and 47, 53, 62, 74. It appears however from a recital in the Treaty of 1787 between Russia and the Two Sicilies that subjects of the latter power were forbidden both in time of war and peace to build ships for, or to sell them to, foreigners; and that they were also forbidden to buy them without express permission. Id. iv. 240. On the other hand, the Venetian government expressly refers to its wish to observe 'la più esatta ed imparziale neutralità'; but the provisions of the edict go in several respects further than can be required by law as it now is.

not to accord any such permission.' He adds that a state which sends succour in troops or in money to one of the two belligerents 'can no longer in strictness demand to be looked upon as a neutral,' although in the case of pre-existent treaties it is 'the custom to regard it as such[1].' It has been remarked by Kent that De Martens attached exaggerated importance to treaties, and in this case it would seem to be mainly on their authority that he declares neutrality to be inconsistent with the acceptance by neutrals of letters of marque. And, after all, his doctrine is expressed with some hesitation. Both applications of his general principles are carefully limited by the words 'à la rigueur.' Custom in these matters was growing; it was not yet established.

1793. Neutrality policy of the United States.

The United States had the merit of fixing it permanently. On the outbreak of war in Europe in 1793, a newly-appointed French Minister, M. Genêt, on landing at Charlestown, granted commissions to American citizens who fitted out privateers and manned them with Americans to cruise against English commerce. Immediate complaint was made by the English Minister, who expressed his 'persuasion that the government of the United States would regard the act of fitting out these privateers in its ports as an insult offered to its sovereignty[2].' The view taken by the American government was in fact broader, and Mr. Jefferson expressed it clearly and tersely in writing to M. Genêt, 'that it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers; that the granting military commissions[3] within the United States by any other authority than their own is an infringement of their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their

[1] Précis du Droit des Gens, §§ 264, 265, and note to latter section, ed. 1788. The later editions are modified.

[2] Mr. Hammond to Mr. Jefferson, June 7, 1793.

[3] M. Genêt maintained that to grant commissions and letters of marque was one of the usual functions of French consuls in foreign ports.

country[1].' Somewhat later he writes to Mr. Morris, American Minister in Paris, 'that a neutral nation must in all things relating to the war observe an exact impartiality towards the two parties . . . that no succour should be given to either, unless stipulated by treaty, in men, arms, or anything else directly serving for the war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments[2].' Taking this language straightforwardly, without forcing into it all the meaning which a few phrases may bear, but keeping in mind the facts which were before the eyes of Mr. Jefferson when he penned it, there can be no doubt that the duties which it acknowledges are the natural if not inevitable deductions from the general principles stated by Bynkershoek, Vattel, and De Martens; and there can be as little doubt that they had not before been frankly fulfilled. To give effect to the views then stated, instructions were issued to the collectors of customs scheduling 'rules concerning sundry particulars which have been adopted by the President as deductions from the laws of neutrality established and received among nations.' Under these, 'equipments of vessels in the ports of the United States which are of a nature solely adapted for war,' and the enlistment of 'inhabitants' of the United States, were forbidden. On the other hand, it was permitted to furnish merchant vessels and ships of war with equipments of doubtful nature, as applicable either to war or commerce[3]. The trial of Gideon Henfield for cruising in one of the privateers commissioned by M. Genêt soon proved that the existing law was not

[1] June 5, 1793. American State Papers, i. 67.

[2] Aug. 16, 1793. American State Papers, i. 116.

[3] Appendix iii to Report of Neutrality Law Commissioners, 1868.

strong enough to enable the government to carry out neutrality in the sense in which they defined it[1]. An Act was accordingly passed by Congress to prevent citizens or inhabitants of the United States from accepting commissions or enlisting in the service of a foreign state, and to prohibit the fitting out and arming of cruisers intended to be employed in the service of a foreign belligerent, or the reception of any increased force by such vessels when armed[2].

The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main however it is identical with the standard of conduct which is now adopted by the community of nations.

[1] Wharton's State Trials, p. 49.
[2] Statutes at Large of the United States, ed. by Peters, i. 381.

CHAPTER III

THE EXISTING LAW AFFECTING BELLIGERENT AND NEUTRAL STATES

PART IV
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General principles of the law of neutrality as ascertained at the end of the eighteenth century.

FROM the somewhat incoherent practice followed by belligerents and neutrals with respect to each other during the eighteenth century, three principles disengage themselves with clearness. The neutral state was bound not to commit any act favouring one of two belligerents in matters affecting their war, and it was in turn incumbent on belligerents to respect the sovereignty of the neutral. It was also recognised, though less fully, that it is the duty of a state to restrain foreign governments and private persons from using the territory and resources of a country for belligerent purposes. In these principles are involved every obligation under which a neutral state can lie, and almost every right the possession of which is important to it. But the foregoing sketch has shown that they were not always observed, and still more that they were not made to yield all the results which logically flow from them. Those results which were in fact reached were not entirely consistent with each other.

Their relation to modern doctrine.

During the present century expansion of trade and quickness of communication have given birth in certain directions to new difficulties in the relations of neutrals and belligerents, while at the same time the vitality of some of the older customs has never been tested in action. Hence a certain number of doctrines appear to survive which can hardly in any true sense be said to live; and on the other hand, new applications of the old principles have continually to be made to complex facts, in dealing with which there is no strict precedent, and sometimes a very doubtful analogy. The most convenient mode therefore of treating the

present relations of neutral and belligerent states will be, after clearing away a few cases of effete doctrine, to take the applications of the principles which have been laid down in the order of their complexity. In the principles themselves there is never any difficulty; the only question to be answered is, whether or not they ought to be applied to a certain state of facts.

Whether troops can be furnished under treaty.

Although, since late in the eighteenth century, no nation has given military assistance to an ally while professing to maintain neutrality, and although no government would probably now venture to conclude a treaty with that object, there are text writers, recent or of existing authority, in whose works the opinion lingers, that a treaty made before the outbreak of war justifies the gift of such assistanee and shelters the neutral from the consequences of his act.

According to Manning, the custom is 'directly at variance with the true basis of neutrality, but it has now been established by the habitual and concurrent practice of states, and is at the present day an undisputed principle of the European law of nations.' Kent and Wheaton are equally positive as to the law and more blind as to the moral aspect of the case; and the doctrine is reasserted in the more modern work of M. Bluntschli[1].

It is impossible to ignore the authority of these writers, but they cite no later precedent than that of the Danish loan of troops to Russia in 1788; it is even doubtful whether the facts of that case are not more against than in favour of the conclusion which they are brought to establish; and no nation is now bound by any like obligation. The usage is not therefore upheld by continuing practice, and it is not in conformity with legal principle, by which, or by practice, it could alone be rendered authoritative. It is granted that the acts contemplated would, apart from prior agreement, be a violation of neutrality as now understood, and it is unnecessary to argue that a prior agreement

[1] Manning, p. 225; Kent, Comm. lect. vi; Wheaton, Elem. pt. iv. chap. iii. § 5; Bluntschli, § 759.

in no way affects the character of acts with reference to a non-consenting third party[1].

Whether loans by neutral individuals are permissible.

It is usually said that a loan of money to one of the belligerent parties is a violation of neutrality[2]. That it is so, if made or guaranteed by the neutral state, is abundantly evident. But it is difficult to understand why modern writers repudiate analogy and custom by condemning the negotiation of a loan by neutral subjects under ordinary mercantile conditions. M. Bluntschli says that the neutral state must abstain from making loans for purposes of war, and adds that the rule is equally applicable to loans negotiated by private persons. Sir R. Phillimore uses language not easily to be reconciled with his emphatic assertions of the right of a neutral subject to trade. Calvo, while agreeing that loans during war are illicit, will not admit that the neutral government is able so to control the acts of individuals in such matters as to be held responsible for their consequences[3]. But outside the boards of works on International Law a healthier rule is unquestioned. A modern belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy for the purchase of money, than because they are open for the purchase of cotton. The reason is obvious. Money is in theory and in fact an article of commerce

[1] The above view is taken by Phillimore, vol. iii. § cxxxviii; Calvo, § 2322; and Heffter, § 117.

[2] Formerly neutrals seem occasionally to have acted under the impression that it is so, and the language of modern books may be founded upon the unnecessary responsibilities which some states may have assumed. In 1795 'le comité du salut public, croyant que la paix conclue avec l'Espagne lui donnerait plus de crédit à l'étranger, imagina de contracter un emprunt pour mettre l'armée d'Italie en état de reprendre l'offensive, et le ministre Villars fut autorisé à ouvrir des négociations dans Gênes à ce sujet. Un mois s'écoula dans l'attente des premiers versements; enfin le Sénat, se retranchant derrière sa neutralité, refusa formellement son autorisation.' Koch, Mém. de Masséna, i. 220.

[3] Bluntschli (§ 768), Phillimore (iii. § clvii), Calvo (§ 2331). Wheaton, Manning, De Martens, Klüber, Heffter, and Twiss make no mention of loans, whether by the sovereign or by subjects. Kent merely says that 'a loan of money to one of the belligerent parties is considered to be a violation of neutrality;' but it does not appear whether this language is intended to include private as well as public loans.

in the fullest sense of the word. To throw upon neutral governments the obligation of controlling dealings in it taking place within their territories would be to set up a solitary exception to the fundamental rule that states are not responsible for the commercial acts of their subjects. And not only would the existence of such an exception be unwarranted by anything peculiar in the nature of money, which is certainly not more noxious than munitions of war, but it would burden states with a responsibility which they would be wholly unable to meet. Money is a merchandise the transmission of which would elude all supervision. Loans need not be handed over in specie; it is possible that payment might be made in bills not one of which might enter the neutral country in which the contract is made; and if it were attempted to stop the practice by penalties, nothing would be more easy than for the real lenders to conceal themselves behind names borrowed in the country of the belligerent debtor. The true law on the subject was laid down by Mr. Webster in 1842 with a decision, and in language, which indicate how clear and invariable the practice of nations is. 'As to advances and loans,' he says, 'made by individuals to the government of Texas or its citizens, the Mexican government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain [1].'

Whether the sale of articles of warlike use by a neutral

The general principle that a mercantile act is not a violation of a state neutrality, is pressed too far when it is made to cover the sale of munitions or vessels of war by a state. Trade is not one of the common functions of a government; and an extraordinary

[1] Mr. Webster to Mr. Thompson, Executive Documents, 27th Congress, 1841–2. The dictum of Lord Wynford in De Wütz *v.* Hendricks, on which Sir R. Phillimore relies as expounding the view of the English courts, merely expresses his opinion that it is 'contrary to the law of nations for persons residing in this country to enter into engagements by way of loan *for the purpose of supporting* subjects of a foreign state in arms against a government in alliance with our own.' ix Moore, 586. During the Franco-German War both the French Morgan Loan and part of the North German Confederation Loan were issued in England.

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state is permissible.

motive must be supposed to stimulate an extraordinary act. The nation is exceptionally unfortunate which is forced to get rid of surplus stores precisely at the moment when their purchase is useful to a belligerent. In the year 1825, the Swedish government, wishing to reduce its navy, offered six frigates for sale to the government of Spain. The latter refused to buy, and three of them were then sold to an English mercantile firm, who, as it afterwards appeared, were probably acting on behalf of Mexico, then in revolt against the mother country. In any case it became known before the vessels were handed over that a further sale had been or was about to be effected to the recognised Mexican agent in England; and the Swedish government, listening to the warmly expressed complaints of Spain, rescinded the contract at some monetary loss to itself, notwithstanding that the ships had been sold in ignorance of their ultimate destination [1]. During the war between France and Prussia, the government of the United States seems to have taken an opposite view of its duty [2]; but there can be no question that Sweden, in yielding, chose the better part. The vendor of munitions of war in large quantities during the existence of hostilities knows perfectly well that the purchaser must intend them for the use of one of the belligerents, and a neutral government is too strictly bound to hold aloof from the quarrel to be allowed to seek safety in the quibble that the precise destination of the articles bought has not been disclosed.

Limits of the duty to prohibit the levy of men within neutral territory.

The principle that it is incumbent on the neutral sovereign to prohibit the levy of bodies of men within his dominions for the service of a belligerent, which was gradually becoming authoritative during the eighteenth century, is now fully recognised as the foundation of a duty. And its application extends to isolated

[1] De Martens, Causes Célèbres, v. 229.

[2] A series of public sales of surplus guns, rifles, and other arms took place at New York. Large quantities were bought by French agents, were taken on board French ships direct from the arsenal at Governor's Island, and were paid for through the French consul. Mr. Thornton to Lord Granville, State Papers, 1871, lxxi. 202. On the general question comp. Ortolan, ii. 182.

instances when the circumstances are such as to lead to serious harm being done to a friendly nation. The acceptance of letters of marque by neutral subjects from a belligerent is now prohibited by international common law, and is always forbidden by the neutral sovereign [1], although from several points of view the act is unobjectionable. An individual may abandon his country and take service with a foreign state; the foreign state is free to accept his services. But in accepting a letter of marque he does not cut himself off from his own state. It is able to lay hands on him; and that ability is enough to fix it with responsibility.

On the other hand, a state is not expected to take precautions against the commission of microscopic injuries [2]. The true limits of neutral care as regards individuals were indicated in the Proclamations of Neutrality issued by England in 1861, 1870 [and 1898]. At the outbreak of the American Civil War it was thought possible that large numbers of English subjects might engage in it, and an express prohibition of such service was therefore inserted in the Proclamation. In that issued at the beginning of the war between France and Germany the prohibition was omitted, it not being likely that any sufficient number to justify government action would be found in the ranks of either army [3] [but it appears again in the Proclamation issued at the outbreak of war between Spain and the United States]. As a matter of fact a few English served as officers in both the German and French armies, without the neutrality of Great Britain being in any way supposed to be compromised.

It is scarcely an exception from the general prohibition to

[1] E. g. see Proclamations of Neutrality issued by Austria, France, Italy, Spain, and the Netherlands, Append. iv to Report of Neutrality Law Commissioners, 1868; and the Spanish Proclamation of 1870, D'Angeberg, No. 254. [See also the British Proclamation of Neutrality, during the war of 1898, between the United States and Spain. Hertslet's Commercial Treaties, vol. xxi. p. 826.] Formerly treaties with respect to letters of marque were very common, for the last half century it has only been thought necessary to make them with South American States; see antea p. 264 n.

[2] Calvo, § 2321; Heffter, § 145.

[3] Hansard, 3rd Series, vol. cciii. 1098.

make levies in a neutral state that a belligerent ship entering a neutral port with a crew reduced from whatever cause to a number less than that necessary to her safe navigation may take on board a sufficient number of men to enable her to reach a port of her own country. In doing this, and no more, she does not become capable of being used as an engine of war, and consequently does nothing which the neutral state is bound to prevent as inconsistent with its neutrality. The matter of course stands otherwise if the limits of bare necessity are passed.

Whether a neutral state may permit a belligerent force to pass through its territory.

During the eighteenth century it was an undisputed doctrine that a neutral state might grant a passage through its territory to a belligerent army, and that the concession formed no ground of complaint on the part of the other belligerent. The earlier writers of the last century, and Sir R. Phillimore more lately, preserve this view, only so far modifying it as to insist with greater strength that the privilege, if accorded, shall be offered impartially to both belligerents[1]. But the most recent authors assert a contrary opinion[2]; no direct attempt has been made since 1815 to take advantage of the asserted right; and the permission granted to the allies in that year to cross Switzerland in order to invade France was extorted from the Federal Council under circumstances which would in any case rob the precedent of authority[3]. The same country in 1870 denied a passage to bodies of Alsatians, enlisted for the French army, but travelling without arms or uniforms[4]; and there can be no question that existing opinion would imperatively forbid any renewed laxity of conduct in this respect on the part of neutral countries. Passage for the sole and obvious purpose of attack is clearly forbidden. The grant of permission is an act done by the state with the express object of furthering a warlike end, and is in its nature

[1] De Martens, Précis, § 310; Kent, lect. vi; Klüber, § 284; Manning, p. 245; Wheaton, Elem. pt. iv. c. iii. § 8; Phillimore, iii. § cliii. Pando (§ cxci) follows Vattel in saying that in cases of extreme necessity the belligerent may effect his passage even against the will of the neutral.

[2] Heffter, § 147; Bluntschli, § 770; Calvo, § 2345; Negrin, p. 173.

[3] Wheaton, Elem. pt. iv. chap. iii. § 4.

[4] Bluntschli, § 770.

an interference in the war. It is therefore a non-neutral act; and the only excuse which can be accepted for its performance would be the impossible one that it is equally advantageous to, and desired by, both belligerents at once.

A broad distinction is however to be drawn between a grant of passage for a specific purpose in time of war, and a grant of passage made in time of peace to enable a state to reach an outlying portion of its territory, or to enable it to reach its possession with more ease than would otherwise be practicable. In the former case the grant, as has been seen, is essentially un-neutral; in the latter it is essentially colourless when made; and if by the occurrence of a war which happens to touch the outlying territory its effects become injurious to one of the two belligerents, the result is an accidental and possibly an unforeseen one. It is difficult to separate the harmless use of the neutral territory for mere garrison purposes from its use for belligerent purposes; and if the former use has been habitual, and especially if it has been secured by treaty, it probably could not be fairly held that the neutral state is guilty of un-neutral conduct in allowing the passage of troops during war. Its behaviour would however require to be judged by the circumstances of the case; a hard and fast line could scarcely be drawn; and while a rigid limitation of the force permitted to pass to the amount of the ordinary reliefs might be the equivalent of handing over the detached territory to the enemy, the grant of passage to greatly more than the usual numbers might be as definitely un-neutral an act as a grant made solely for the purposes of the war[1].

[1] The simplification of the map of Europe which has been effected by the formation of the German Empire has notably diminished the possible occasions upon which the question of the permissibility of continued passage could arise; but at least in one case a right still exists, the use of which in war time might possibly become a subject of dispute. [The railway from Constance to Basle, which leads from the interior of Germany to the Rhine, passes through the Canton Schaffhausen, and Germany has a right of military passage over it. But by the opening of the line from Ulm to Basle, *via* Sigmaringen, Tuttlingen, and Waldshut, which passes altogether clear of Swiss territory, an alternative route has now been provided.]

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Analogous use of neutral territory.

With the passage of troops in an organised condition across neutral territory, and as illustrating the advantages which a belligerent might reap from such passage, may be mentioned an ingenious attempt which was made by Germany in 1870 to use Belgian territory, under a plea of humanity, to facilitate the operations of war. After the battle of Sedan, the victorious army was embarrassed by masses of wounded, whom it was difficult to move into Germany by the routes which were open, and whose support in France in part diverted the commissariat from its normal function of feeding the active army. The German government therefore applied to Belgium for leave to transport the wounded across that country by railway. In consequence of the strong protest of France, Belgium, after consultation with the English government, rejected the application. It is indeed difficult to see, apart from the grant of direct aid or of permission to move a corps d'armée from the Rhine Provinces into France, in what way Belgium could have more distinctly abandoned her neutrality than by relieving the railway from Nancy to the frontier from encumbrances, by enabling the Germans to devote their transport solely to warlike uses, and by freeing the commissariat from the burden of several thousand men lodged in a place of difficult access. [But under article 59 of the Hague Convention a neutral state may authorise the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material.]

Hostilities committed within neutral territory.

It has been already seen that the commission of hostilities within neutral territory was the earliest subject of legal restraint. Their prohibition was so necessary a consequence of the doctrine of sovereignty, and is so undisputed a maxim of law, that it would be superfluous to recur to the subject were it not that aberrations in practice have been more common than in any other matter connected with neutrality in which the rule is so clear. In 1793 the French frigate Modeste was captured in the harbour of Genoa by two English men of war; and it was neither

restored nor was any apology made for the violation of Genoese neutrality[1]. But in the same year the American government acted upon this law by causing the restoration of the ship Grange, seized in Delaware Bay; and the English Courts gave effect to it by voiding a capture which took place within the mouths of the Mississippi[2]. The principle upon which the closely allied act of issuing from neutral ground for an immediately hostile end is interdicted was laid down by Lord Stowell in a case in which an English frigate lying within Prussian waters sent out its boats to make captures among vessels anchored in the neighbouring roads at the entrance of the Dollart.

Use of neutral territory by a belligerent as a base of operations.

Much the larger number of cases in which the conduct of a neutral forms the subject of complaint is when a belligerent uses the safety of neutral territory to prepare the means of ultimate hostility against his enemy, as by fitting out expeditions in it against a distant objective point, or by rendering it a general base of operations. In many such cases the limits of permissible action on the part of the belligerent, and of permissible indifference on the part of the neutral, have not yet been settled. Generally the neutral sovereignty is only violated constructively. The acts done by the offending belligerent do not involve force, and need not entail any interference with the supreme rights of the state in which they are performed. They may be, and often are, innocent as regards the neutral except in so far as they endanger the quiescence of his attitude towards the injured belligerent; and their true quality may be, and often is, perceptible only by their results.

At the root of this class of cases lies the principle that a neutral state cannot allow its territory to become a scene of hostile operations to the disadvantage of one of two belligerents. The

[1] Botta, Storia d'Italia, i. 161 and 192. See also the case already mentioned of the Swedish vessels seized at Oster Risser (antea, p. 80); that of the General Armstrong in 1814 (postea, p. 624); and that of the Florida, captured in Bahia Bay by the Wachusett in 1864 (id. p. 620).

[2] Mr. Jefferson's letter to M. Ternant, Am. State Papers, i. 77; The Anna, v Rob. 373.

extension of this principle to acts of hostility taking their commencement in neutral ground and leading to immediate violence, which was made by Lord Stowell, is equally applicable to acts the completion of which is more remote in point of time or place, but which have been as fully prepared within the neutral territory. All such acts must be offences against the neutral on the part of the belligerent performing them; and if knowingly permitted by the neutral they are offences on his part against the belligerent for whose injury they are intended. Ordinarily their identification presents little difficulty. There could be no question as to the nature of the filibustering expeditions from the United States, of those which fed the Cretan insurrection [of 1867], or of the Fenian incursions into Canada; and there can be as little question that the conduct of the Greek and American governments presented examples of grave deviations from the spirit of the rule of neutrality and from the letter of that which guides nations in time of general peace[1]. In cases of this kind the neutral country is brought under the common military definition of a base of operations; it becomes the territory 'from which an army' or a naval force 'draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need[2].'

Special mode in which cruisers may make neutral ports their base of operations.

But there are some cases in which the question whether a neutral territory is so converted by a belligerent into a base of operations as to affect the neutral state with responsibility is not so readily answered. An argument placed before the Tribunal of Arbitration at Geneva on behalf of the United States, though empty in the particular case to which it was applied, suggests that the essential elements of the definition of a base possess

[1] [The landing of Colonel Vassos in Crete with a force of regular Greek troops in February, 1897, falls within a different category. The expedition was under the direct sanction of his government who were then on the brink of war with Turkey, and though the Greek army did not cross the Thessalian frontier till seven weeks later (April 8), the acceptance of responsibility for the action of Vassos was tantamount to a declaration of war.]

[2] Jomini, Précis de l'Art de la Guerre, 1re partie, chap. iii. art. 18.

a wider scope than is usually given to them. In 1865 the Shenandoah, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United States; her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the government of that country that 'the main operation of the naval warfare' of the Shenandoah having been accomplished by means of the coaling 'and other refitment,' Melbourne had been converted into her base of operations. The argument was unsound because continued use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable.

That previously to the American Civil War neutral states were not affected by liability for acts done by a belligerent to a further point than that above indicated, there can be no

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question; but there is equally little question that opinion has moved onwards since that time and the law can hardly be said to have remained in its then state. Even during the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval[1]. There can be little doubt that no neutral states would now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent. When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety, is to provide the belligerent with means of aggressive action; and consequently to violate the essential principles of neutrality.

What constitutes an expedition.

In the case of an expedition being organised in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the

[1] Earl Russell to the Lords Commissioners of the Admiralty, January 31, 1862. State Papers, 1871, lxxi. 167. Among late writers, Ortolan (ii. 286), Bluntschli (§ 773), and Heffter (§ 149) simply register the existing rule. Calvo (§ 2371) expresses his approval of the English regulations.

moment of leaving. In 1828, a body of troops in the service of Dona Maria, who had been driven out of Portugal, took refuge in England. They remained for some time an organised body under military officers. In the beginning of 1829 they embarked in four vessels, nominally for Brazil, but in fact for Terceira, an island belonging to Portugal. In order to avoid the arrest of the expedition in England, the arms intended for it had been sent as merchandise from a port other than that from which the men started. The English government considered that as the men were soldiers, although unarmed, they constituted a true expedition, and a small squadron was placed in the neighbourhood of Terceira to prevent a landing from being effected. The vessels were stopped within Portuguese waters, and were escorted back to Europe[1]. The British government interfered so thoroughly at the wrong time and in the wrong manner, that in curing a breach of its own neutrality it was drawn into violating the sovereignty of Portugal. But on the main point, as to the character of the expedition, it was no less distinctly right than in its methods it was wrong.

On the other hand, the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organised whole. In 1870, during the Franco-German War, nearly 1,200 Frenchmen embarked at New York in two French ships, the Lafayette and the Ville de Paris, for the purpose of joining the armies of their nation at home. They were not officered or in any way organised; but the vessels were laden with 96,000 rifles and 11,000,000 cartridges. Mr. Fish was of opinion that the ships could not be looked upon as intended to be used for hostile purposes against Germany; the men not being in an efficient state, and the arms and ammunition being in themselves subjects of legitimate commerce[2]. There can be no

[1] Hansard, N. S. xxiii. 738–81, and xxiv. 126–214; Bulwer's Life of Lord Palmerston, i. 301–2.

[2] Mr. Thornton to Lord Granville, Aug. 26, 1870; State Papers, 1871,

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doubt that the view taken by the government of the United States was correct. It was impossible for the men and arms to be so combined on board ship, or soon after their arrival in France, as to be capable of offensive use. It would have been a different matter if the men had previously received such military training as would have rendered them fit for closely proximate employment.

Expeditions combined outside neutral territory from elements issuing separately from it.

It has been proposed to stretch the liability of a neutral sovereign so as to make him responsible for the ultimate effect of two independent acts done within his jurisdiction, each in itself innocent, but intended by the persons doing them to form part of a combination having for its object the fitting out of a warlike expedition at some point outside the neutral state. The argument upon which this proposal rests has been shortly stated as follows: 'The intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for those acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise [1].'

In accordance with this view, it was contended on the part of the United States before the Tribunal of Arbitration at Geneva that the Alabama and Georgia, two vessels in the Confederate service, were in effect 'armed within British jurisdiction.' The Alabama left Liverpool wholly unarmed on July 29, 1862, and received her guns and ammunition at Terceira, partly from a vessel which cleared a fortnight later from Liverpool for Nassau in the Bahamas, and partly from another vessel which started from London with a clearance for Demerara. In like manner the Georgia cleared from Glasgow for China, and

lxxi. 128. [But in the recent case of Wiberg v. United States, 163 United States Reports, p. 632, the Supreme Court took a stricter view of the proximate combination into an expedition of men, arms and ammunition when conveyed in the same ship to a common destination with a common object.]

[1] Dana, Notes to Wheaton, Elem. No. 215.

received her armament off the French coast from a vessel which sailed from Newhaven in Sussex.

The intent of acts, innocent separately, but rendered by this theory culpable when combined, can only by their nature be proved when the persons guilty of them are no longer within neutral jurisdiction. They cannot therefore be prevented by the state which is saddled with responsibility for them; and this responsibility must mean either that the neutral state will be held answerable in its own body for injury suffered by the belligerent, in which case it will make amends for acts over which it has had no control, or else that it is bound to exact reparation from the offending belligerent, at the inevitable risk of war.

If this doctrine were a legal consequence of the accepted principles of international law it might be a question whether it would not be wise to refuse operation to it on the ground of undue oppressiveness to the neutral. But no such difficulty arises; for, as responsibility is the correlative of power, if a nation is to be responsible for innocent acts which become noxious by combination in a place outside its boundaries, it must be enabled to follow their authors to the place where the character of the acts becomes evident, and to exercise the functions of sovereignty there. But even on the high seas it is not permissible for a non-belligerent state to assume control over persons other than pirates or persons on board its own ships; and within foreign territory it has no power of action whatever.

Limits of neutral responsibility.

The true theory is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such in themselves as to violate neutrality or to raise a violent presumption of fraud, he steps in to prevent their consequences; but if they are presumably innocent, he is not justified in interfering with them. If a vessel in other respects perfectly ready for immediate warfare is about to sail with a crew insufficient for fighting purposes, the neutral

sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and an expectation that it is intended gives him the right of taking precautions to prevent it. But no fraudulent use takes place when a belligerent in effect says: I will not compromise your neutrality, I will make a voyage of a hundred miles in a helpless state, I will take my chance of meeting my enemy during that time, and I will organise my expedition when I am so far off that the use of your territory is no longer the condition of its being.

Equipment of vessels of war in neutral territory.

It is somewhat difficult to determine under what obligations a neutral state lies with respect to vessels of war and vessels capable of being used for warlike purposes, equipped by or for a belligerent within its dominions.

1. Is the mere construction and fitting out, in such manner that they shall be capable of being used by him for warlike purposes, an international offence? or,

2. Is such construction to be looked upon as an act of legitimate trade; and is it necessary, to constitute an international offence, that some further act shall be done, so as to make such vessels elements in an expedition?

When, on general principles of International Law, (1) a breach of neutrality is committed,

The direct logical conclusions to be obtained from the ground principles of neutrality go no further than to prohibit the issue from neutral waters of a vessel provided with a belligerent commission, or belonging to a belligerent and able to inflict damage on his enemy. A commission is conclusive evidence as to the fact of hostile intent; and in order to satisfy the alternative condition it is not necessary that the ship shall be fully armed or fully manned. A vessel intended to mount four guns and to carry a crew of two hundred men would be to an unarmed vessel sufficiently formidable with a single gun and half its complement of seamen. But to possess any force at all, it must possess a modicum of armament, and it must have a crew sufficient at the same time to use that armament and to handle

the ship. If then the vessel seems at the moment of leaving the neutral port to fulfil these conditions, the neutral must, judging from the facts, infer a hostile intent, and prevent the departure of the expedition.

(2) An armed vessel is merely contraband of war.

On the other hand, it is fully recognised that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man of war, is a proper subject of commerce. There is nothing to prevent its neutral possessor from selling it, and undertaking to deliver it to the belligerent either in the neutral port or in that of the purchaser, subject to the right of the other belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters. 'There is nothing,' says Mr. Justice Story, 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit [1].' If the neutral may sell his vessel when built, he may build it to order; and it must be permissible, as between the belligerent and the neutral state, to give the order which it is permissible to execute. It would appear therefore, arguing from general principles alone, that a vessel of war may be built, armed, and furnished with a minimum navigating crew, and that in this state, provided it has not received a commission, it may clear from a neutral harbour on a confessed voyage to a belligerent port without any infraction of neutrality having been committed.

Effect of usage.

The question remains, Is there a special usage with respect to the building and fitting out of ships which abridges the common law privileges of neutrals?

It has been already mentioned that in 1779 the neutrality edicts of various minor Italian States rendered it penal to sell, build, or arm privateers or vessels of war for any of the then belligerents; and a like provision occurs in the Austrian ordinances of 1803 [2].

[1] La Santissima Trinidad, vii Wheaton, 340.
[2] Antea, p. 590; De Martens, Rec. viii. 106.

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Practice of the United States.

In 1793 the instructions issued to the collectors of customs of the United States professed, according to an accompanying memorandum, to mark out the boundaries of neutral duty as then understood by the American government. And though Washington, in a speech to Congress [1], took the narrower ground that in the then posture of affairs he had resolved to 'adopt general rules which should conform to the treaties and assert the privileges of the United States,' the wider language of the memorandum should probably be preferred. The first paragraph declares 'that the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful;' and the seventh adds that 'equipments of vessels in the ports of the United States which are of a nature solely adapted to war are deemed unlawful [2].' These regulations, besides forbidding the original arming and equipping of vessels by a belligerent, prohibit the reception of any warlike equipment by vessels already belonging to him: but they do not specify as illegal the building and arming of a vessel intended to be delivered outside neutral territory, but not belonging to a belligerent at the moment of exit, although built to his order. The Neutrality Act of the United States went further, and made it penal to fit out and arm or procure to be fitted out and armed, &c., any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign state to cruise or commit hostilities against the subjects, &c., of another state with which the United States shall be at peace [3]. For some time the policy of the

[1] Dec. 3, 1793.

[2] The word 'original' not being repeated, either the first paragraph becomes mere surplusage, or the equipment forbidden in the seventh paragraph must be read as equipment other than original.

Relation of municipal laws to international duty.

[3] Act of 1795, sect. 3. In this instance indications external to the Act lead to the belief that it was intended to give effect to what was believed to be the duty of a neutral state; but it must be remembered that it is generally unsafe to use municipal laws to define the view of international duty taken by a nation. It may be more convenient to discourage the inception of acts, which would only in the later stage become international wrongs, than to deal with them when ripe; and it was never pretended

United States was in strict accordance with their municipal law; and subsequently they have at least expected the conduct of other nations to be in conformity with its requirements; it must therefore be supposed to continue to embody what are to their view international duties.

Of England.

England has also retained a Foreign Enlistment Act for many years upon her Statute Book, and she has strengthened its provisions after full warning of the manner in which municipal laws may be employed to damnify the position of a nation in international controversy.

Finally, Great Britain and the United States have agreed that they will for the future 'use due diligence to prevent the fitting out, arming, or equipping within the jurisdiction' of the contracting power 'of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended

that a nation lies under an international obligation to give effect to its municipal regulations, until the United States suggested the doctrine for a special object to the arbitrators at Geneva. For reasons of humanity England chose to go beyond the line of duty towards persons not her own subjects in keeping up a squadron on the coast of Africa for the suppression of slavery. It would be as reasonable to say that she contracted an international obligation to continue the maintenance of this squadron, as to declare that a country is bound by a municipal law which is in advance of what can be required of it by international usage.

There are only two ways—both of them indirect—in which municipal laws can produce an international effect. After a law has been administered for some time by the courts of a state, it either insensibly becomes to the majority of the people their standard of right, or it arouses in them pronounced dislike. In the latter case a law dealing with such matters as international relations will fall into desuetude or be repealed. In the former a tendency will in time grow up to act according to its provisions irrespectively of the obligations which it imposes. So long also as the law is administered at all, foreign nations will each expect to reap the full benefit which has accrued to another from its operation; and any failure on the part of the neutral government to make use of its powers gives a ground for suspecting unfriendliness, which the belligerent cannot be expected in the heat of war to estimate at its true value. It is therefore unwise for a people to enact or to retain neutrality laws more severe than it believes the measure of its duty to compel.

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to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use[1].' As the respective governments of the two countries are not agreed on the true meaning of this language, it is useless to speculate as to the effect which might be given to the provisions of the Treaty of Washington during any future war in which either Great Britain or the United States is a belligerent, the other of the two being neutral.

Of France.

In France no special law exists forbidding the construction or outfit of vessels of war, but all persons exposing the state to reprisals or to a declaration of war are liable to punishment under the Penal Code, which leaves the state to accommodate its rules to international law existing for the time being[2]; and in 1861, on the outbreak of the American Civil War, a Proclamation of Neutrality was issued, referring to the appropriate articles of the Code, and prohibiting all French subjects from 'assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties.' Under this proclamation six vessels which were in course of construction in French ports for the Confederate States were arrested.

Of other nations.

In 1864 the Danish War gave occasion to Italy for the adoption of a like rule; and in 1866 the government of the Netherlands for the first time 'undertook to see that the equipment of vessels of war intended for the belligerent parties should not take place in the ports of the Netherlands[3].' The codes of Austria, Spain, Portugal, and Denmark prohibit any one from procuring arms, vessels, or munitions of war for the service of a foreign power[4]. The intention may have been to prevent the issue of privateers, but the language would no doubt

[1] Treaty of Washington, art. vi; De Martens, Nouv. Rec. Gén. xx. 702.

[2] Code Pénal, arts. 84 and 85. For a summary of the municipal laws of France affecting enlistments and expeditions, see letters of M. de Moustier to Mr. Fane, Neut. Laws Commissioners' Rep., Append. iv. p. 46.

[3] Note of M. Zuylen de Nyevelt to Mr. Ward, 1867. For this and the whole continental practice in the matter, see Neut. Laws Commissioners' Rep., Append. iv.

[4] Rev. de Droit Int. vi. 502.

restrain the construction of vessels for belligerent use. No nation except England and the United States has gone further than to prohibit the armament of a vessel fitted solely for fighting purposes.

Conclusions as to existing law.

A comparison of international custom with the logical results of the unquestioned principles of neutrality seems then to lead to these conclusions.

1. That an international usage prohibiting the construction and outfit of vessels of war, in the strict sense of the term, is in course of growth, but that although it is adopted by the most important maritime powers, it is not yet old enough or quite wide enough to have become compulsory on those nations which have not yet signified their voluntary adherence to it.

2. That in the meantime a ship of war may be built and armed to the order of a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; or it may be delivered to him within such territory, and may issue as belligerent property, if it is neither commissioned nor so manned as to be able to commit immediate hostilities, and if there is not good reason to believe that an intention exists of making such fraudulent use of the neutral territory as has been before indicated.

That the usage which is in course of growth extends the duties of a neutral state into new ground is plain; but it does not follow that the extension is either unhealthy or unnecessary. Though an armed ship does not differ in its nature from other articles merely contraband of war, it does differ from all in the degree in which it approaches to a completed means of attacking an enemy. The addition of a few trained men to its equipage, and of as much ammunition as can be carried in a small coasting vessel, adapts it for immediate use as part of an organised whole of which it is the most important element. The same cannot be said of any other article of contraband. It is neither to be expected nor wished that belligerent nations should be patient of the injury which would be inflicted upon them by the

supply of armed vessels to their enemies as mere contraband of war.

Within what limits equipment of vessels should be forbidden.

But it is much to be hoped that the rule will not retain the indefiniteness which attaches to it in its present inchoate form. In planting their doctrine upon the foundation of the intent of the neutral trader, or of the agent of the offending belligerent in the neutral country, instead of upon the character of the ship itself, jurists appear hardly to have realised how unimportant is the advantage which is given to the injured belligerent in comparison with the grave evils of an indefinite increase in the number of international controversies. Experts are perfectly able to distinguish vessels built primarily for warlike use; there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce. Perhaps few fast ships are altogether incapable of being so used as to inflict damage upon trade; and there is at least one class of vessels which on the principles urged by the government of the United States in the case of the Georgia might fix a neutral state with international responsibility in spite of the exercise by it of the utmost vigilance. Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralysing the whole ship-building and ship-selling trade of the neutral country[1].

[1] In 1875, the Institute of International Law adopted a series of resolutions with respect to the duties of neutrals, founded upon the three rules of the Treaty of Washington. In these it was declared that 'l'État neutre est

PART IV CHAP. III Effect of neutral sovereignty upon, 1. captured persons,

The jurisdiction of a sovereign being exclusive, upon him necessarily depends the liberty of the person and the ownership of property within his dominions. If any one is retained in captivity there, he is identified with the act; and therefore, as it has always been held, with obvious reason, that it is a continuation of hostilities to bring prisoners of war into neutral territory, its sovereign cannot allow subjects of a state with which he is in amity to remain deprived of their freedom in places under his control. If they touch his soil they cease to be prisoners[1]. An exception from this general rule is made in the case of prisoners on board a commissioned ship of a belligerent power, since the act of retaining them in custody falls under the head of acts beginning and ending on board the ship, and not taking effect externally to her, and is therefore one in respect of which a ship of war, under its established privileges, is independent of the jurisdiction of a foreign state within the waters of which it may be[2].

tenu de veiller à ce que d'autres personnes (than its own agents) ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction. Lorsque l'État neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empêcher, et de poursuivre comme responsables les individus qui violent les devoirs de la neutralité.' Annuaire de l'Inst. de Droit Int. 1877, p. 139.

[1] Vattel, liv. iii. chap. vii. § 132; Lord Stowell, in The Twee Gebroeders, iii Rob. 165; Bluntschli, § 785. In 1588 several hundred Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais. They were claimed by the ambassador of Spain, but the council of the king decided that in touching the shores of France they had regained their liberty, and they were sent to Constantinople. Martin, Hist. de France, x. 93. The Neutrality Ordinance of Austria of 1803 says: 'Il ne sera pas permis aux Puissances belligérantes de mettre à terre dans nos ports, etc., aucun individu comme prisonnier de guerre: car aussitôt que de tels prisonniers auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance.' De Martens, Rec. viii. 111; and the Neutrality Edict of Venice, 1779, art. xx, ib. iii. 84.

[2] See antea, p. 194. The principle is applicable to privateers, L'Invincible, i Wheaton, 252; and according to Hautefeuille (tit. vi. chap. ii. sect. 3) and

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2. property.

It is not easy to see why property should not be subject to the principle which governs the treatment of persons. It is in fact admitted in the case of that which has come into the possession of a belligerent by way of booty, if the requirement of deposit in a safe place of possession during twenty-four hours has not been satisfied before neutral territory is entered[1]. But the practice with respect to property taken at sea has till lately been anomalous. The right of the captor to that which unquestionably belongs to his enemy is no doubt complete as between him and his enemy so soon as seizure has been effected; but as between him and a neutral state, as has been already seen[2], further evidence of definitive appropriation is required, and his right to the property of a neutral trader seized, for example, as being contraband goods or for breach of blockade, is only complete after judgment is given by a prize court. If therefore the belligerent carries his prize into neutral waters, without deposit in a safe place or possession during twenty-four hours in the case of hostile property, or without protection from the judgment of a prize court in the case of neutral property, he brings there property which does not yet belong to him; in other words, he continues the act of war through which it has come into his power. Indirectly also he is militarily strengthened by his use of the neutral territory; he deposits an encumbrance, and by recovering the prize crew becomes free to act with his whole force. Nevertheless, although the neutral may permit or forbid the entry of prizes as he thinks best, the belligerent is held, until express prohibition, to have the privilege not only of placing his prizes within the security of a neutral harbour, but of keeping them there while the suit for their condemnation is being prosecuted in the appropriate court[3]. Most writers think that he

Calvo (§§ 1132–3) it so far extends to prizes that prisoners may be retained on board of them.

[1] Vattel, liv. iii. ch. vii. § 132.

[2] Antea, pp. 453 et seq.

[3] 'An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793–1815) leads

is also justified by usage in selling them at the neutral port after condemnation; and, as they then undoubtedly belong to him, it is hard to see on what ground he can be prohibited from dealing with his own[1]. But it is now usual for the neutral state to restrain belligerents from bringing their prizes into its harbours, except in cases of danger or of want of provisions, and then for as short a time as the circumstances of the case will allow; and it is impossible not to feel an ardent wish that a practice at once wholesome and consistent with principle may speedily be transformed into a duty[2].

Duty of a neutral state to procure redress for injuries done to a belligerent within its territory.

It follows from the fact of a violation of the sovereignty of a nation being an international wrong, that the injured country has the right of demanding redress; and the obligation under which a neutral state lies to prevent infraction of its neutrality would seem to bring with it the duty of enforcing such redress in all cases in which the state would act if its own dignity and interests were alone affected. Its duty cannot be less than this, because quiescence under any act, which apart from the interests of the belligerent would not be permitted, is the concession of a special favour to his enemy; and it cannot be more, because no

to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid.' This is also the law in France. Phillimore, iii. § ccclxxix.

[1] Ortolan, Dip. de la Mer, ii. 303, 306, 310. He grounds the admission of prizes into a neutral port on the *primâ facie* evidence of property which is afforded by the belligerent flag.

Kent, Comm. lect. vi; Manning, 387; Wheaton, Elem. pt. iv. ch. iii. § 13; Heffter, § 147.

Bluntschli (§§ 777 and 857) appears to agree with the above writers as to the existing law, but to think, as is unquestionably the fact, that it is in course of being changed.

Phillimore (iii. § cxxxix) seems to look upon a treaty made before outbreak of war as needed to make the reception of prizes a strictly legitimate act.

[2] Denmark laid down the rule for her guidance so long ago as 1823, and England, France, the United States, Prussia, Italy, Sweden, Holland, Spain, Portugal, and the Hanseatic Towns gradually acceded to it. Some admit prizes taken by public ships of war, while excluding those captured by privateers; but all forbid their sale. Neut. Laws Commissioners' Report, Append. iv; Calvo, § 2379.

Practice in the matter.

one has a right to expect another to incur greater inconvenience or peril for him in their common quarrel than a man actuated by the ordinary motives would undergo on his own account. A state is supposed not to allow open violations of its territory to take place without exacting reparation; it is therefore expected to demand such reparation in the interest of the belligerent who may have received injury at the hands of his enemy within the neutral jurisdiction. And, as, from the exclusive force of the will of a sovereign state, all acts contrary to it done within the territory of the state are void, the redress which it is usual to enforce consists in a replacement in its anterior condition, so far as may be possible, of anything affected by the wrongful act. Thus, when in 1864 the Confederate cruiser Florida was seized in the harbour of Bahia by the United States steamer Wachusett, the Brazilian Government immediately demanded reparation from the Cabinet at Washington. The latter was unable to restore the vessel, which had foundered in Hampton Roads, but it surrendered the crew, and offered a more special satisfaction for the affront to Brazilian sovereignty by saluting the flag of the Empire at the spot where the offence had been committed, by dismissing the consul at Bahia, and by sending the captain of the Wachusett before a court-martial. Again, in 1863, the Chesapeake, a passenger boat plying between New York and Portland, was captured on its voyage by a small number of Confederate partisans, who had embarked at New York. She was pursued by an armed vessel belonging to the United States, which found her and seized her in British waters. Two men only were on board, the rest of the captors having deserted her, but a third prisoner was taken out of an English ship lying alongside. The United States surrendered the vessel and the men, and made an apology for the violation of territory of which its officers had been guilty [1].

When property captured in

If an occasion offers, the neutral sovereign will take upon himself to undo the wrongful act of the belligerent. When property

[1] Dana's Wheaton, note, Nos. 207 and 209, gives the cases in detail.

Violation of neutrality returns to the neutral jurisdiction.

is captured in violation of neutrality, whether actually within the neutral territory, or by a vessel fitted out in a neutral port, it will be seized on entering the neutral jurisdiction, and will be restored to its original owner[1]; and as a state possesses a right of pursuing vessels into the open sea and arresting them there for

[1] Wheaton, Elem. pt. iv. chap. iii. § 12; Pando, tit. iii. sect. vii. § 192; Hautefeuille, tit. vi. sect. ii. and tit. xiii. sect. i. § 2; Ortolan, Dip. de la Mer, ii. 298; Phillimore iii. §§ clvii–viii, cccxxvii, and ccclxxii. Calvo (§ 2843) limits the right of the neutral sovereign to cases of capture within his jurisdiction.

Mode in which restitution is effected.

'When a captured vessel is brought, or voluntarily comes *infra praesidia* of the neutral power, that power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property.' La Estrella, iv Wheaton, 298. See also La Amistad de Rues, v Wheaton, 385; Talbot *v.* Janson, iii Dallas, 157; and The Betsey Cathcart, Bee. 292.

Properly, whatever the municipal means employed, restoration ought in all cases to be effected, so far as the surrender to the belligerent is concerned, by an immediate act of the state. The wrong being solely international, all its consequences are international also; and in most countries restoration may be made either by the state administratively, or by its courts judicially. Calvo, § 2363; Hautefeuille, ubi sup. But the advantage, when the property of individuals is involved, of a judicial investigation of evidence, generally throws such cases into the lap of the courts. When restoration is craved on the ground of capture within the neutral territory, the belligerent government is expected itself to prosecute the suit—the individual owner will not be heard; and even a consul is not clothed with sufficient representative character to appear on behalf of his state. Note to The Twee Gebroeders, iii Rob. 162; La Santissima Trinidad, vii Wheaton, 341; The Anne, iii Wheaton, 446. The latter part of the rule is undoubtedly logical. 'Capture in neutral waters as between enemies is deemed to all intents and purposes rightful. If the neutral sovereign omits or declines to put in a claim, the property is condemned *jure belli* to the captors.' The Anne, iii Wheaton, 447; and see Bluntschli, § 786. But when the capture has been the result of a remoter breach of neutrality on the part of the offending belligerent, as by making neutral territory a base of operations, the private owner is allowed to claim in the courts of the United States. Justice Story, speaking in 1822, said: 'If the question were entirely new it would deserve very grave consideration whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct interposition of the government itself. But the practice from the beginning of this class of cases, a period of nearly thirty years, has been uniformly the other way, and it is now too late to disturb it.' La Santissima Trinidad, vii Wheaton, 349. If the captured property has been carried into the jurisdiction of the belligerent whose subjects are the wrongdoers, his courts will do justice to the neutral state on application being made by it to them. Twee Gebroeders, ubi sup.;

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infractions of its municipal laws, directed only against itself, it must be held competent to give effect by like action to its neutral duties [1].

When it so returns after having been *infra praesidia* of the captor.

According to Wheaton it is doubtful whether the neutral will restore property 'which has been once carried *infra praesidia* of the captor's country, and there regularly condemned in a competent court of prize;' but Ortolan justly urges that as the sovereign rights of a nation cannot be touched by the decision of a foreign tribunal, the consequences of such a decision cannot be binding upon it [2]; and it may be put still more generally that nothing performed *mero motu* by a wrong-doer in confirmation of his own wrongful act can affect the rights of others.

When it is a vessel which has been converted into a commissioned ship of war.

The case however stands differently when the captured property is a ship which, before returning to the neutral port, has been furnished with a commission from the captor's sovereign. The Admiralty courts of the neutral may enquire whether the vessel is in fact commissioned [3]; but so soon as it is proved to be invested with a public character, though the right of the neutral state to expect redress for the violation of its sovereignty remains

La Nostra Señora del Carmel contre la Vénus de Médicis; Pistoye et Duverdy, Traité des Prises Maritimes, i. 106; Ortolan, ii. 298.

The practice is everywhere more or less erroneous theoretically. There can be no doubt that it is the government within whose territory the wrong has been done which ought to call into action its own courts in all instances in which the prize comes within its jurisdiction; and that the neutral state, when the property has been carried into the dominions of the belligerent, should confine itself to international means for obtaining restitution.

[1] Comp. antea, p. 256. The Courts of the United States have decided to the above effect; Hudson *v.* Guestier, vi Cranch, 284, overruling Rose *v.* Himely, iv Cranch, 279. These cases only involved breaches of municipal regulations; but they are generally held to admit of a wider application.

[2] Wheaton, Elem. pt. iv. chap. iii. § 13; Ortolan, Dip. de la Mer, ii. 312. An incidental remark of Justice Johnson, made while giving a decision in the Supreme Court of the United States, supports, and perhaps was the source of, Wheaton's opinion. The Arrogante Barcelones, vii Wheaton, 519. It has also been said that 'The sentence of a court of admiralty or of appeal in questions of prize binds all the world as to everything contained in it, because all the world are parties to it.' Penhallow *v.* Doane's Executors, iii Dallas, 86.

[3] L'Invincible, i Wheaton, 254.

unaltered, its own right to apply the remedy is gone. The vessel has become invested with the immunities belonging to public ships of a state. Its seizure would therefore be an act of war, and the neutral can only apply for satisfaction to the offending belligerent [1].

Exclusion of such ships from neutral ports.

But though, if a vessel so commissioned is admitted at all within the ports of the neutral, it must be accorded the full privileges attached to its public character, there is no international usage which dictates that ships of war shall be allowed to enter foreign ports, except in cases of imminent danger or urgent need. It is fully recognised that a state may either refuse such admission altogether, or may limit the enjoyment of the privilege by whatever regulations it may choose to lay down [2]. It is therefore eminently to be wished that a practice may be established under which a neutral government shall notify at the commencement of a war, that all vessels mixed up in certain specified ways, whether as agents or as objects, with an in-

[1] It was contended on behalf of the United States before the Tribunal of Arbitration of Geneva, that Great Britain had a right to seize vessels fitted out in violation of her neutrality on entry into her ports after receipt of a commission. State Papers, North America, 1872, Case of the United States, p. 55, Argument of the United States, p. 113. The argument seems to rest on the assumptions, 1. That the privileges accorded to foreign public vessels are revocable at will; 2. That a belligerent people not recognised as a nation does not possess the same belligerent privileges as a recognised state. Neither assumption can be admitted for a moment to be correct. It is unfortunate that the arbitrators, with the exception of Sir A. Cockburn, committed themselves to the statement that 'the privilege of exterritoriality accorded to vessels of war has been admitted into the Law of Nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality.' Whatever sources the immunities of vessels of war may have originally sprung from—and, as has been seen (antea, p. 169), courtesy was no doubt one, though not the only one—there is no question that those immunities cannot now be refused at will. For the extent of the immunities of vessels of war see antea, p. 194.

[2] 'Siendo el asilo un derecho y no un deber para la Potencia neutra, claro está que puede negarlo ó concederlo, y en este último caso imponer á los buques admitidos todas las restricciones que estime convenientes á su seguridad ó á sus intereses.' Negrin, p. 179.

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fringement of its neutrality, will be excluded from its ports. The rules established by the Empire of Brazil during the American Civil War adopted this precaution, though in dangerously vague language, by directing that no belligerent who had once violated the neutrality of the Empire should be admitted to its ports during the continuance of hostilities, and that all vessels attempting acts tending to such violation should be compelled to leave its maritime territory immediately, without receiving any supplies[1].

No practice as yet exists with respect to the exaction by the neutral sovereign of reparation for acts done outside his jurisdiction, but flowing from a violation of his neutrality, when neither the captured property nor the peccant vessel return to his territory.

Effect of resistance by a belligerent attacked within neutral territory.

A belligerent who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility.

In 1814 an American privateer, the General Armstrong, was found at anchor in Fayal harbour by an English squadron. A boat detachment from the latter approached the privateer and was fired upon. The next day one of the vessels of the squadron took up position near the General Armstrong to attack her. The crew, not finding themselves able to resist, abandoned and destroyed her. The United States alleged that the Portuguese governor had failed in his duty as a neutral, and demanded a large compensation for the owners of the privateer. After much correspondence the affair was submitted in 1851 to the arbitration of the President of the French Republic, who held that as Captain Reid, of the privateer, 'had not applied at the beginning to the neutral, but had used force to repel an improper

[1] State Papers, North America, 1873; Protocols, &c., 202. Mr. Bernard, however, shows that such a practice would not be unattended with inconvenience. Neutrality of Great Britain, 414. [And no such provision is contained in the British Proclamation and rules of neutrality issued during the Spanish-American War.]

aggression, of which he stated himself to be the object, he had himself disregarded the neutrality of the territory in which he was, and had consequently released its sovereign from all obligations to protect him otherwise than by his good offices; that from that moment the Portuguese government could not be responsible for the results of a collision which had taken place in contempt of its sovereign rights[1].'

Reparation due by a neutral state for permitted violation of neutrality.

A neutral state which overlooks such violations of its neutrality as it can rightly be expected to prevent, or which neglects to demand reparation in the appropriate cases, becomes itself an active offender. It is bound therefore to give satisfaction in some form, if satisfaction be required, to the belligerent whose interests have been prejudiced by its laches. The nature of this satisfaction is of course a matter for agreement between the parties.

Hospitality and asylum.

Although it is incumbent on the neutral not to lend his territory for purposes of war, his right to admit his friends within it extends to the reception of belligerent forces under such conditions as shall guard against any abuse of his hospitality. Custom and the inherent difference between land and marine war have rendered these conditions unlike in the two cases. Perhaps the only occasion which hostilities on land afford to the neutral of extending his hospitality to belligerent persons other than those who resort to his country for commercial or private reasons, and who have therefore no relation to the war, is when a beaten army or individual fugitives take refuge in his territory from the pursuit of their enemy. Humanity and friendship alike recommend him to receive them, but his duty to the other belligerent requires that they shall not again start from his soil in order to resume hostilities; and it has been the invariable practice in late wars to disarm troops crossing the neutral frontier and to intern

To land forces of a belligerent.

[1] Ortolan (Dip. de la Mer, ii. 547) gives the text of the President's award. Mr. Justice Story (The Anne, iii Wheaton, 447) seems to have considered a belligerent attacked in neutral territory to be justified in using force in self-defence.

them till the conclusion of peace. The convention of February 1871 under which Switzerland received the army of General Clinchant suggests a difficulty which may in the future interfere with the continuance of neutral custom in the precise form which it wears at present[1]. It would be intolerably burdensome to a neutral state to maintain as guests for a long time any considerable body of men; on the other hand, by levying the cost of their support upon the belligerent an indirect aid is given to his enemy, who is relieved from the expense of keeping them and the trouble of guarding them as prisoners of war, while he is as safe from the danger of their reappearance in the field as if they were in his own fortresses. Perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent states by which the latter should undertake not to employ them during the continuance of the war. [The Hague Convention imposes upon the neutral state the duty of supporting the interned troops, subject to reimbursement on the conclusion of hostilities[2].]

To naval forces.

Marine warfare so far differs from hostilities on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a state as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigour of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbour without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety, she may take in such provisions as she needs, and if a steamer she may fill up with enough coal to enable her to reach the nearest port of her own country; nor is there anything to prevent her from enjoying the security of

[1] De Martens, Nouv. Rec. Gén. xix. 639.
[2] Art. 58.

neutral waters for so long as may seem good to her. To disable a vessel, or to render her permanently immoveable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency towards the enforcement of a harsher rule becomes more defined with each successive war.

It is easy to fix the proper measure of repairs; difficulties, short of such circumstances as those which have already been discussed, may sometimes occur with reference to supplies of coal or provisions; but if a belligerent can leave a port at his will, the neutral territory may become at any moment a mere trap for an enemy of inferior strength. Accordingly, during a considerable period, though not very generally or continuously, neutral states have taken more or less precaution against the danger of their waters being so used[1]. Perhaps the usual custom until lately may be stated as having been that the commander of a vessel of war was required to give his word not to commit hostilities against any vessel issuing from a neutral port shortly before him, and that a privateer as being less a responsible person was subjected to detention for twenty-four hours[2]. The disfavour however with which privateers have long been regarded has not

[1] So long ago as 1759 Spain laid down the rule that the first of two vessels of war belonging to different belligerents to leave one of her ports should only be followed by the other after an interval of twenty-four hours. Ortolan, Dip. de la Mer, ii. 257. In 1778 the Grand Duke of Tuscany forbade both ships of war and privateers to go out for twenty-four hours after a ship whether enemy or neutral (di qualsivoglia bandiera). De Martens, Rec. iii. 25. The Genoese rule was the same; Venice was contented with the promises of the neutral commander that he would not molest an enemy or neutral for twenty-four hours, but she retained privateers for that time in port. Ib. 80. The Austrian proclamation of neutrality of 1803 ordered vessels not to hover outside the Austrian ports, nor to follow their enemies out of them; it also imposed the twenty-four hours' rule on privateers, and in the case of ships of war required the word of the captain that he would not commit hostilities.

[2] Pistoye et Duverdy, i. 108.

infrequently led to their entire exclusion, save in cases of danger from the sea or of absolute necessity; and the twenty-four hours' rule has been extended to public ships of war by Italy, France, England, the United States, and Holland. Probably it may now be looked upon as a regulation which is practically sure to be enforced in every war.

Mr. Bernard says: 'The rule that when hostile ships meet in a neutral harbour the local authority may prevent one from sailing simultaneously with or immediately after the other, will not be found in all books on international law. It is however a convenient and reasonable rule; it has gained, I think, sufficient foundation in usage; and the interval of twenty-four hours adopted during the last century in a few treaties and in some marine ordinances has been commonly accepted as a reasonable and convenient interval[1].'

It will probably be found necessary to supplement the twenty-four hours' rule by imposing some limit to the time during which belligerent vessels may remain in a neutral port when not actually receiving repairs. The insufficiency of the twenty-four hours' rule, taken by itself, is illustrated by an incident which occurred during the American Civil War. In the end of 1861, the United States corvette Tuscarora arrived in Southampton Water with the object, as it ultimately appeared, of preventing the exit of the Confederate cruiser Nashville, which was then in dock. By

[1] Hist. Acc. of the Neut. of Great Britain, p. 273. The treaties in which the exercise of this rule is provided for are all with the Barbary States. Bluntschli declares in unqualified terms that 'in strict law a ship of war cannot quit a neutral port for four-and-twenty hours after the departure of an enemy's vessel.' § 776 bis. If international law contained any such rule, a correlative duty of enforcing it would weigh upon the neutral; but of this I can find no indication. The neutral may take what precautions he chooses in order to hinder a fraudulent use being made of his ports provided he attains his object. If he prefers to rely upon the word of a commander, there is nothing to prevent him. Even if the twenty-four hours' rule becomes hardened by far longer practice than now sanctions it, the right of the neutral to vary his own port regulations can never be ousted. The rule can never be more than one to the enforcement of which a belligerent may trust in the absence of notice to the contrary.

keeping up steam and having slips on her cable, so that the moment the Nashville moved, the Tuscarora could precede her, and claim priority of sailing, by moving and returning again within twenty-four hours, and by notifying and then postponing her own departure, the latter vessel attempted and for some time was able to blockade the Nashville within British waters. In order to guard against the repetition of such acts, it was ordered in the following January that during the continuance of hostilities, any vessel of war of either belligerent entering an English port should 'be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew, or repairs;' in either of which cases the authorities of the port were ordered 'to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours.' In 1870 [and in 1898] the same rule was laid down; and the United States, unwilling to allow to others the license which she permitted to herself, adopted an identical resolution. It is perhaps not unlikely soon to become general[1].

[1] Bernard, 270; Neut. Laws Commissioners' Rep., Append. No. vi; State Papers, lxxi. 167, 1871. [Hertslet, Commercial Treaties, vol. xxi. p. 834.]

Negrin (p. 180) well sums up as follows the conditions upon which belligerent vessels are now admitted into neutral ports.

'Las condiciones,' he says, 'del asilo respecto de los beligerantes son:

'1ª. Observar la mejor armonía y una paz completa en el puerto, aún con los mismos enemigos.

'2ª. No reclutar gente para aumentar ó completar las tripulaciones.

'3ª. No aumentar el calibre de la artillería, ni embarcar armas y municiones de guerra en buques militares y corsarios.

'4ª. No hacer uso del asilo para vigilar los buques enemigos ni obtener noticias sobre sus futuros movimientos.

'5ª. No abandonar el puerto hasta veinticuatro horas despues de haberlo hecho la escuadra ó buque enemigo, mercante ó de guerra que en él se hallaba.

'6ª. No intentar apoderarse, ya sea por la fuerza ó por la astucia, de las presas que pueda haber en el puerto.

'7ª. No proceder á la venta de las que se conduzcan al mismo, miéntras no hayan sido declaradas legítimas por el tribunal competente.'

CHAPTER IV

GENERAL VIEW OF THE RELATIONS OF BELLIGERENT STATES AND NEUTRAL INDIVIDUALS

PART IV
CHAP. IV
General principles of the law.

THE general right possessed by a belligerent of restraining commercial acts done by private persons which materially obstruct the conduct of hostilities, gives rise to several distinct groups of usage corresponding to different commercial relations between neutrals and the other belligerents.

All trade divides itself into two great heads. It consists either in the purchase or sale of goods, or in carrying them for hire from one place to another. The purchase of goods by a neutral is the subject of no belligerent restriction. The general principle that a neutral has a right to trade with his belligerent friend, necessarily covers a commerce by which the war can in no case be directly affected. The belligerent gains nothing else than his mercantile profit, and to forbid such trade would therefore be to forbid all trade. But by the sale of goods the neutral may provide his customer with articles which, either by their own nature, or from some peculiar need on the part of the belligerent, may be of special use in the conduct of hostilities. These therefore the enemy of the latter may intercept on their road after leaving neutral soil, and before sale to a belligerent purchaser has transformed them into goods liable to seizure as enemy property. Again, under the second head a neutral may send articles innocent in themselves for sale in places access to which the belligerent thinks it necessary for the successful issue of his war to forbid altogether, and which he is allowed to bar by so placing an armed force as to make approach dangerous; or the neutral may employ his ships in effecting a transport illicit because of the character of the merchandise or of the place to which it is taken; or finally he may associate his property

with that of the belligerent in such manner as to show the existence of a community of interest, or an intention of using his neutral character to protect his friend. The effect of the various acts which fall under these heads differs with the degree of noxiousness which is attributed to them; but in all cases, as the possession of a right carries with it the further right to use the means necessary for its enforcement, the belligerent is allowed to inflict penalties of sufficient severity to be deterrent.

The larger bodies of practice which have asserted themselves successfully with reference to these divisions, may on the whole be explained by the more or less reasonable application of the principle that a belligerent has the right to carry on his operations without obstruction. It is easy to see the relation to this principle of the prohibition to carry goods the supply of which may increase the strength of a belligerent, and of that to carry any goods to besieged places; and though the connexion is less plain, it can still be discovered in the cases where, by associating himself with belligerent property, a neutral would, if left alone, impede the belligerent right of weakening and embarrassing his enemy by seizing his property. But two exceptional practices must either be looked upon as abnormal, or must be explained by the admission of a different and very dangerous principle as a ground of international rule.

Exceptional practices.

The better established of these customs arises out of the right of barring access of innocent trade to an enemy's country, and under the name of commercial blockade has extended the prohibition beyond the area of purely military operations to all coasts which can be guarded by the fleet of the belligerent. A blockade which is or which forms part of a military operation, may consist in a siege—i. e. in an investment combined with an attack; or in a simple investment, of which the object is to reduce a place by famine; or in the denial to commerce of territory access to which is commanded by an army, or finally in the denial to commerce of a portion of coast of indefinite extent, in order to embarrass the movements of a land force of the enemy which but for the

Commercial blockade.

blockade would draw its supplies, or a portion of them, from the sea. All these kinds of blockade are of course fully warranted by the right of a belligerent to carry out his operations of war without being obstructed by neutrals. But according to existing usage it would be legitimate, in a war between England and the United States, for the former power to blockade the whole Californian coast, while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada. To forbid all neutral commerce, when no immediate military end is to be served, and when the effect of the measure upon the ultimate issue of the war is so slight as usually to be almost inappreciable, is to contradict in the plainest manner the elementary principle that neutrals have a right, as a general rule, to trade with the enemy[1]. If this principle can

[1] 'The right of blockade is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade which was open to him in time of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, viz. that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.' The Franciska, x Moore, 50.

Until the outbreak of the civil war in America some disposition was shown by the statesmen of the United States to question the propriety of commercial blockades, and they put the objection to them with much force. Mr. Marshall said: 'On principle it might well be questioned whether this rule (viz. that of confiscation of vessels) can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals.' Mr. Marshall to Mr. King, September 20, 1800; iii Wheaton, Append.

And Mr. Cass, on the breaking out of the Italian war, issued a circular to the American representatives in Europe in which it was laid down that 'The blockade of an enemy's coast, in order to prevent all intercourse with neutrals, even for the most peaceful purpose, is a claim which gains no additional strength by an investigation into the foundation on which it rests, and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and materials neces-

be invaded in order that a belligerent may be subjected to a mere incidental annoyance, it is for all practical purposes non-existent. The theoretic reasoning which would justify a commercial blockade would equally justify an order, unsupported by the presence of an armed force, prohibiting neutrals from entering an enemy's port, and declaring any vessel with such destination to be a good prize. The best excuse for the usage is that the line of separation between a military and a commercial blockade is in some cases extremely fine; and that occasionally a blockade which in its origin is of the latter character is insensibly transformed into the former. Thus the blockade of the whole coasts of the Confederated States during the American Civil War, which began by being no more than the largest commercial blockade ever instituted, was ultimately of considerable military importance, and aided directly in carrying out a plan of operations which had for its object to stifle the enemy by compression on every side.

It may also be urged that in proportion as general maritime commerce becomes freed from liability to capture, it is necessary that a belligerent should be confirmed in the special privileges which enable him to overcome the advantages derived by his enemy from the ease and cheapness of transport by sea. Owing to the limitation of transport by land to certain lines of road, and to the cost of effecting it by indirect routes, an invasion

sary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates, if now first presented for consideration.' Quoted in Cobden's Speeches, vol. ii. 288. Mr. Cobden himself argued warmly in favour of the suppression of commercial blockades. See his Speeches, Foreign Policy, No. vii.

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intercepts trade over a larger area than could be generally touched by such maritime blockades as are combined with military operations. Hence wars which are carried on by land, incidentally establish blockades upon a very large scale, and among the means by which an invasion is calculated and intended to reduce an enemy, is the derangement to his foreign and internal trade which is caused by the occupation of his country. Although therefore, when this derangement is itself the sole object to which naval or military forces are directed, they are engaged in naval or military operations in so strained a sense that the manner in which a neutral is affected must be looked upon as anomalous, it is not likely that the right of maintaining commercial blockades will be readily abandoned, nor, in spite of the very serious objections which exist against them in their more extreme forms, is it quite certain that neutrals have a moral right to demand their cessation [1].

The rule of the war of 1756.

The second exceptional practice is that known as the rule of the war of 1756. It was formerly the policy with all European governments to exclude foreign ships from trade with their colonies, and though this rule has been destroyed or modified, it is still unusual to permit strangers to engage in the coasting trade from one port to another of the home country.

These exclusions gave rise to the question whether if a belligerent throws open his close trade in time of war either to a favoured neutral or to all neutrals, his enemy has a right to

[1] Some foreign writers (Ortolan, ii. 329; Hautefeuille, tit. ix. chap. i. sect. 1) have endeavoured to found the right of blockade on the theory that the space of water attached territorially to the land is conquered by the belligerent who occupies it with his naval forces, and that he refuses entrance to it in virtue of his territorial right. M. Cauchy objects to this, that as water is merely attached to the land, which alone renders it susceptible of appropriation, conquest of the land must be a necessary preliminary of legal right over the neighbouring sea. Whether the theory is tenable or not it is scarcely worth while to consider, for the usage did not arise out of it; it is merely a modern invention, useless for any purpose except to give a logical satisfaction to the minds of writers who without it would have been painfully affected by the abnormal character of a practice which they were bound to recognise.

deny to them the enjoyment of the proffered advantages. The first occasion on which the principle came into dispute, on considerations of general law[1], was in 1756, when the French, under the pressure of the maritime superiority of England, opened the trade between the mother-country and its colonies to the Dutch, while persisting in their habitual exclusion of other neutrals. The English captured and condemned the Dutch ships, with their cargoes, on the ground that they had been in effect incorporated into the French commercial navy. Before the outbreak of war in 1779, France announced, probably as a measure of precaution, that trade with her West Indian colonies would thenceforth be permanently open; the rule which the English had laid down in 1756 was therefore allowed to sleep. It is not easy to say how far acquiescence in a change of policy on the part of France, which can only have been looked upon as colourable, was suggested by the dominant opinion of the time. In the century which preceded the commencement of the American War, eight treaties, including those of Utrecht between England and France, and between France and the United Provinces, stipulated that either of the contracting parties should be at liberty to trade between ports belonging to enemies of the other[2]; and, as might be expected, the First Armed Neutrality asserted the freedom of coasting trade as one of the privileges for which its members contended. On the other hand only two treaties have expressly declared such trade to be unlawful: but the French Règlements of 1704 and 1744 both enforced the principle of the rule with the utmost stringency. Whatever may have been the state of current

[1] A controversy which occurred between the English and the Dutch in 1674 seems to have been determined on conventional grounds.

[2] These treaties were, besides those of Utrecht, that between England and the United Provinces in 1675 (Dumont, vii. i. 319), and those between the United Provinces and Spain, 1676 (ib. 325), the United Provinces and Sweden, 1679 (ib. 439), the United Provinces and Russia, 1715 (id. viii. i. 469), Spain and the Empire, 1725 (ib. ii. 115), and France and the United States, 1778 (De Martens, Rec. ii. 598).

opinion before the beginning of the French revolutionary wars, the rule of 1756 was then revived in more than its former strength.

Its extension in 1793.

There can be no question that a special privilege such as that enjoyed by the Dutch, exposes the neutral to be suspected of collusion with the belligerent whose favours he accepts; and that he cannot complain if the enemy of his friend forms a harsh judgment of his conduct. The matter stands otherwise if a trade is opened to all neutrals indifferently. In 1793, however, the French having opened their coasting and colonial trade to neutrals, the latter were not only forbidden by England to carry French goods between the mother-country and her colonies, or to engage in her coasting trade [1], but they were also exposed to penalties for conveying neutral goods from their own ports to those of a belligerent colony, or from any one port to another belonging to the belligerent country. The reasons for this severity may be gathered from the judgments of Lord Stowell. It was considered that a belligerent would not relax a system of such importance as that under which he retained in his own hands the coasting and colonial traffic, unless he felt himself to be disabled from carrying it on; that under such circumstances the neutral must be aware that he was assisting one of the two parties to the war in a peculiarly effective manner; 'was it,' in fact, 'possible to describe a more direct and more effectual opposition to the success of hostilities, short of actual military assistance?' With respect to colonial trade, there was a further reason. Colonies were often dependent for their existence on supplies from without; if they could not be supplied and defended by their owner, they fell of necessity to the belligerent who had incapacitated him from holding the necessary communication with them. What right had a third party to step in and

[1] It was the rule of English prize courts to give freight to the neutral carrier when enemy's goods in his custody were seized. The prohibition to trade with belligerent goods between belligerent ports entailed as its practical effect the withdrawal of this indulgence.

prevent the belligerent from gathering the fruit of his exertions? These arguments, taken alone, would be equally valid against any trade in innocent commodities, the possession of which might be accidentally valuable to a belligerent; but they were really rooted in the assumption that a neutral is only entitled to carry on trade which is open to him before the war. Upon him lies the burden of proving that his new trade is harmless to the belligerent; and if he fails in this proof, the support which he affords to the enemy may be looked upon as intentionally given. The justice of this doctrine was strongly contested by the American government; it has since remained a subject of lively debate in the writings of publicists[1]; and it cannot be said to have been sanctioned by sufficient usage to render such debate unnecessary. Nor is it easy to see that the question has necessarily lost its importance to the degree which is sometimes thought. The more widely the doctrine is acted upon that enemy's goods are protected by a neutral vessel, the more necessary it is to determine whether it ought to be governed in a particular case by exceptional considerations.

The arguments which may be urged on behalf of the right of neutrals to seize every occasion of extending their general commerce do not seem to be susceptible of a ready answer. Neutrals are in no way privy to the reasons which may actuate a belligerent in throwing open a trade which he has previously

[1] See Wheaton, i. Append. Note iii for a detailed history of the practice during the Seven Years' War, and those of the American and French Revolutions. Mr. Justice Story thought coasting trade to be too exclusively national for neutrals to be permitted to engage in it, and was 'as clearly satisfied that the colonial trade between the mother-country and the colony, when that trade is thrown open merely in war, is liable in most instances to the same penalty;' but he objected to the further extension of the rule which forbade all intercourse with the colony. The English writers, Manning (267), Phillimore (iii. § ccxxv), uphold the principle of the rule, and Heffter (§ 165), though clearly disliking the rule, treats it as fairly established; Wheaton (pt. iv. chap. iii. § 27), Kent (Lect. v.) and Ortolan (lib. iii. chap. v) come to no definite conclusion; Bluntschli (§§ 799–800), Gessner (266–77), Calvo (§ 2410) pronounce for the legality of the prohibited commerce.

been unwilling to share with them; they can be no more bound to enquire into his objects in offering it to them than they are bound to ask what it is proposed to do with the guns which are bought in their markets. The merchandise which they carry is in itself innocent, or is rendered so by being put into their ships; in the case of coasting trade they take it to ports into which they can carry like merchandise brought from a neutral harbour; and the obstructing belligerent is unable to justify his prohibition by any military strength which it confers upon him. On the one hand the neutral is free from all belligerent complicity with a party to the war; on the other the established restrictive usages afford no analogy which can be extended to cover the particular case.

Heads of law.

The above being the only exceptions from the general rule that permitted restraints upon neutral trade to flow from a right conceded to the belligerent to prevent his military operations from being obstructed, it is evident that such differences as may exist in other matters between the practices and the doctrines on the subject which are in favour with various nations, arise not from disagreement as to the ground principles of law, but as to the extent or the mode of their application. It is admitted in a general sense that a belligerent may restrain neutral commerce, but it is disputed whether he may interfere at all with certain kinds of trade, and with respect to others how far his rights extend. In one or other of these ways each of the divisions of trade before mentioned has been, or still is, the subject of lively controversy; and in the following chapters it will therefore be necessary to examine each in more or less of detail.

The law affecting them may be divided into the following heads:—

i. That which deals with forbidden goods, viz. articles contraband of war.

ii. That which deals with forbidden carriage in its subdivisions of

1. Carriage of analogues of contraband, viz. persons and despatches affected with a specially dangerous character.
2. Carriage of goods to forbidden places; i.e. to places under blockade.

iii. That which deals with neutral goods entrusted to or under the protection of a belligerent.

Together with the law belonging to the second head, must be mentioned the prohibition to carry goods belonging to a belligerent, which though no longer a dominant rule, is not yet so fully abandoned that it can be passed by in silence.

Finally, it is convenient to treat separately the law of visit and seizure, or the means which a belligerent is authorised to take in order to establish that a neutral trader can be affected by penalties for any of the above reasons.

CHAPTER V

CONTRABAND

PART IV
CHAP. V

Uncertainty of usage as to what objects are included in contraband.

THE privilege has never been denied to a belligerent of intercepting the access to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself. But at no time has opinion been unanimous as to what articles ought to be ranked as being of this nature, and no distinct and binding usage has hitherto been formed, except with regard to a very restricted class.

Views of Grotius.

Grotius placed all commodities under three heads. 'There are some objects,' he says, 'which are of use in war alone, as arms; there are others which are useless in war, and which serve only for purposes of luxury; and there are others which can be employed both in war and in peace, as money, provisions, ships, and articles of naval equipment. Of the first kind it is true, as Amalasuintha said to Justinian, that he is on the side of the enemy who supplies him with the necessaries of war. The second class of objects gives rise to no dispute. With regard to the third kind, the state of the war must be considered. If seizure is necessary for defence, the necessity confers a right of arresting the goods, under the condition however that they shall be restored unless some sufficient reason interferes[1]. The division which was made by Grotius still remains the natural framework of the subject. Objects which are of use in war alone are easy to enumerate and to define. They consist of arms and ammunition, the lists of which, as contained in treaties, remain essentially the same as in the eighteenth century. The only variations which time has introduced have followed the changes in the form and names of weapons. As to this head

[1] De Jure Belli et Pacis, lib. iii. c. i. § 5.

therefore there is no difference of opinion; but beyond it certainty is at once lost. The practice of different nations has been generally determined by their maritime strength, and by the degree of convenience which they have found in multiplying articles, the free importation of which they have wished to secure for themselves, or to deny to their enemy. Frequently, they have endeavoured by their treaties to secure immunity for their own commerce when neutral, and have extended the list of prohibited objects by proclamation so soon as they became belligerent.

Practice in the seventeenth century. The United Provinces.

Of the treaties concluded by the United Provinces with England, France, Spain, and Sweden, between 1646 and the end of the seventeenth century, only three contained articles classing as contraband any other commodities than munitions of war. In these three the addition of horses was made. In four treaties provisions, and in two naval stores, were expressly excluded[1]. But in 1652, being at war with England, and again in 1657 with Portugal, they issued edicts placing articles of naval construction in the list of contraband; in the beginning of each subsequent war a like edict was promulgated, and in 1689 a further enlargement embraced grain and provisions of every sort[2].

England.

The stipulations of the treaties entered into by England were more varied than those by which Holland was bound. In one provisions were stated to be contraband; in two they were excluded. Horses and soldiers were included in three, and money and ships in two; on the other hand materials of naval construction were excluded in one[3].

There is some reason to believe that the accepted English list of contraband articles varied considerably during the century.

[1] With France, 1646 (Dumont, vi. i. 342); Spain, 1650 (ib. 570); England, 1654 (ib. ii. 74); England, 1668 (id. vii. i. 74); England, 1674 (ib. 282); England, 1675 (ib. 288); Sweden, 1675 (ib. 316); France, 1678 (ib. 357).

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. c. x.

[3] Besides the conventions mentioned above, England concluded treaties with Sweden, 1654 (Dumont, vi. ii. 80); France, 1655 (ib. 121); Sweden, 1661 (ib. 385); Sweden, 1666 (id. vi. iii. 83); Spain, 1667 (id. vii. i. 31); France, 1667 (ib. 327).

PART IV CHAP. V In 1626, it appears from letters of the Maréchal de Bassompierre, then ambassador in London, that the English negotiators with whom he treated counted amongst the number metals, money, timber, and provisions[1]; but in 1674, Sir Leoline Jenkins, in reporting to the King upon a case in which English pitch and tar, carried in a Swedish vessel, had been captured and taken into Ostend for adjudication, said that 'these goods, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law but by the general law of nations. I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and immediately subservient to the use of war, except it be in the case of besieged places, or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with[2].' It would seem therefore that, in the opinion of the chief English authority on international law in the latter end of the century, articles of direct use for warlike purposes were alone contraband under the common law of nations, but that each state, in order to meet the special conditions of a particular war, possessed the right of drawing up at its opening a list of articles to be contraband during its continuance.

France. France was insignificant as a naval power till the war of 1672, and the larger number of her treaties have already been mentioned in speaking of England and Holland. One which was entered into with the Hanse Towns in 1655 is to be noted as including horses and naval stores, while excluding provisions; and the Peace of the Pyrenees was silent as to naval stores, and coincided in its stipulations as regards horses and provisions with the treaty of 1655[3]. In 1681, the Ordonnance de la Marine, which has been generally looked upon as fixing French law upon the matter, laid down that 'arms, powder, bullets, and other munitions of war, with horses and their harness, in course of transport for the service of our enemies, shall be confiscated[4].'

[1] Ortolan, ii. 185. [2] Wynne, Life of Sir Leoline Jenkins, ii. 751.
[3] Dumont, vi. ii. 103 and 64. [4] Valin, Ord. de la Marine, ii. 264.

Practice in the eighteenth century.

The eighteenth century was opened with the inclusion of naval stores by France in 1704, but on the whole French practice was sufficiently consistent. Its treaties invariably stated munitions of war and saltpetre to be contraband, and with one exception they included horses; but they all expressly excluded provisions; except in one case they refused to admit into the list money and metals; in two cases materials of naval construction are unmentioned, and in only one treaty, made in 1742, are they specifically included. The treaties made with the United States in 1778, with England in 1786, and with Russia in 1787, also excluded ships. The practice of Spain has been identical in principle with that of France[1].

England.

The treaties concluded by Great Britain during the eighteenth century in the main followed the terms of the Treaty of Utrecht, which embodied the French doctrine of contraband; they all excluded provisions, and confiscated saltpetre; six include horses, two are silent with respect to them, and one with Russia—a state which seems to have made a point of securing free trade in horses—strikes them from the list by name. In five cases no mention is made of money or metals; in three both, and in one money alone, are excluded. Naval stores are unmentioned in five treaties; by the rest commerce in them is permitted[2].

These treaties bound England at different times with France, Spain, Sweden, Russia, Denmark, and the United States, but they in no way expressed the policy of the country as apart from special agreement; and their principles were not acted upon in dealing with states with which no convention existed. Thus a larger part of Europe was usually exposed to the operation of English private regulations than was protected by treaty

[1] [The Spanish Decree of April 23, 1898, does not expressly include horses among contraband of war.]

[2] It would seem from Burrell's Admiralty Reports (p. 378) to have been considered by England in 1741 that contraband articles, apart from treaty, were confined to arms, saltpetre, and horses with their furniture. 'Ropes, sails, anchors, masts, planks, boards, and all other materials for building and repairing ships are reputed free goods.'

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from the effects of her maritime predominance. In the end of the Seven Years' War, for example, Sweden and the United Provinces were the only countries with which any limiting treaty remained in force. Towards Russia, Denmark, the Hanse Towns, Mecklenburg, Oldenburg, Portugal, the Two Sicilies, Genoa, and Venice, she might act in accordance with her general views of belligerent rights[1]; and these seem then, as afterwards, to have permitted the list of contraband articles to be enlarged or restricted to suit the particular circumstances of the war[2].

The Baltic Powers.

The Baltic Powers are said by Wheaton to have been at issue with England during the whole of the eighteenth century with respect to the contraband character of naval stores[3]. But though Sweden concluded a treaty with Great Britain in 1720, by which materials of naval construction were declared not to be contraband, her own ordinance of 1715 includes all articles 'which can be employed for war[4].' Russia agreed with the United Provinces in 1715, that naval stores should be taken to be contraband, and made a treaty with England in 1766, in which the question is left open. Denmark on the other hand excluded naval stores by her treaty of 1701 with the United Provinces, but made them contraband by a regulation issued in 1710 during war with Sweden[5], as well as by treaty with France in 1742, and with England in 1780. Down to the time of the First Armed Neutrality therefore, the practice of the three northern states does not seem to have been characterised by definite purpose. Holland maintained her policy of varying the lists of contraband articles at pleasure until the middle of the eighteenth century, when the diminution of her naval power carried her from among the advocates of belligerent privilege into those of neutral rights.

[1] The clause forbidding trade in contraband in the treaty with Denmark of 1670 is not inconsistent with the inclusion of anything useful to the enemy of the contracting parties.

[2] The Jonge Margaretha, i Rob. 193.

[3] Elements, pt. iv. chap. iii. § 24.

[4] v Wheaton, Appendix, 75.

[5] Valin, Ord. de la Marine, ii. 264.

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Jurists of the eighteenth century.

The writers of the period were not more consistent with each other than was practice with itself. Heineccius, writing in 1721, ranked as contraband of war not only munitions of every kind, saltpetre, and horses, but cordage, sails, and other naval stores, together with provisions[1]. Bynkershoek on the other hand strives to limit the number of prohibited commodities as rigidly as is possible, consistently with the rules applied by his nation. He lays down broadly that everything is contraband which may be employed by belligerents for purposes of war, whether it is a completed instrument of war, or some material in itself suitable for warlike use. What articles however he intends to indicate by the second clause of his description is not very evident, for he immediately expresses a doubt whether the material is contraband out of which something may be fitted for war. Descending to particulars, he allows materials for building ships to be confiscated if the enemy is in urgent need of them; saddles, scabbards, and such articles, he is ready to condemn unless they are in numbers so small as not apparently to be intended for hostile use; as regards saltpetre he seems to leave the question open[2]. It is important, as Sir R. Phillimore re-

[1] 'In quibus mercibus vetitis accenseri animadvertimus omnia arma ignivoma, eorumque adparatus, qualia sunt tormenta, bombardae, mortaria, betardae, bombi, granatae, circuli picei, tormentorum sustentacula, furcae, balthei, pulvis nitratus, restes igni capiendo idoneae, sal nitrum, globi, item hastae, gladii, galeae, cassides, loricae, bipennes, spicula, equi, ephippia, aliaque instrumenta bellica. Quin et triticum, hordeum, avena, legumina, sal, vinum, oleum, vela, restes, et siqua alia ad adparatum nauticum pertinent. . . . Ceterum sunt quaedam de quibus inter gentes aliquando disceptatum est, an mercibus vetitis sint accensenda. Sic de vaginis aliquando dubitatum. . . . Vaginis non minus opus est hosti quam gladiis; et quamvis vaginis non vulneret aut stragem edat, inutiles tamen essent ipsi gladii futuri, nisi vaginae eos a pluvia et rubigine tuerentur. Eadem ergo ratio, quae vela, restes nauticas, frumenta, prohiberi suasit, ipsis etiam vaginis facile poterit accommodari.' De Nav. ob Vect. Merc. Vetit. Comm. xiv.

[2] 'Excute pacta gentium, quae diximus, excute et alia quae alibi exstant, et reperies, omnia illa appellari contrabanda, quae, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta. . . . Atque inde judicabis, an ipsa materia rerum prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur Zoucheus' (De Jure Feciali, pt. ii. s. vii. q. 8). 'Ego non essem, quia ratio et exempla me movent in contrarium. Si omnem

PART IV CHAP. V marks, that Bynkershoek adopts the principle of considering the circumstances of each case, and that the list of contraband articles must therefore, according to him, be variable. Vattel enumerates 'arms and munitions of war, timber, and everything which serves for the construction and armament of vessels of war, horses, and even provisions, on certain occasions when there is hope of reducing the enemy by famine[1].' Valin, writing in 1766, says that 'tar has also been declared to be contraband, with pitch, resin, sailcloth, hemp, and cordage, masts and ship-building timber. Thus, apart from their contravention of particular treaties, there is no reason to complain of the conduct of the English, for by right these things are now contraband, and have been so from the beginning of the century, though formerly the rule was otherwise[2].' Lampredi reduces contraband merchandise to those articles only, 'which are so formed, adapted, and specialised as to be unfit to serve immediately and directly for other than warlike use[3].' He appears to ground his doctrine upon the language of treaties. On comparing the jarring opinion of these different authors with the treaties which have been enumerated and with the indications of unilateral practice which here and there occur in history, it seems to stand out with tolerable clearness that no distinct rule existed in the eighteenth century with regard to the classification of merchandise as innocent or as contraband. On the one hand, there is no doubt that France thought it to her interest to restrict the number of articles classed under the latter head; on the other, it is as evident that England wished to preserve entire freedom of action; but the position of other nations is not so certain,

materiam prohibeas, ex qua quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex qua non saltem aliquid, bello aptum, facile fabricemus. Hac interdicta, tantum non omni commercio interdicimus, quod valde esset inutile. . . . Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et abeque ea commode bellum gerere haud possit.' Quæst. Jur. Pub. lib. i. c. x.

[1] Droit des Gens, liv. iii. chap. vii. § 112.

[2] Ord. de la Marine, ii. 264.

[3] Del Commercio dei Popoli Neutrali in Tempo di Guerra, 70.

and the extended catalogues which were sanctioned by a German, a Swiss, and a Frenchman must have been grounded on a wider opinion than could be evidenced by the practice of England and Holland alone.

The First Armed Neutrality.

It was natural, however, that the secondary maritime powers should in time accommodate their theories to their interests. They were not sure of being able as belligerents to enforce a stringent rule; they were certain as neutrals to gain by its relaxation. Accordingly, in 1780 Russia issued a Declaration of neutral rights, among the provisions of which was one limiting articles of contraband to munitions of war and sulphur. Sweden and Denmark immediately adhered to the Declaration of Russia, and with the latter power formed the league known as the First Armed Neutrality. Spain, France, Holland, the United States, Prussia, and Austria, acceded to the alliance in the course of the following year. Finally it was joined in 1782 by Portugal, and in 1783 by the Two Sicilies.

It is usual for foreign publicists to treat the formation of the Armed Neutrality as a generous effort to bridle the aggressions of England, and as investing the principles expressed in the Russian Declaration with the authority of such doctrines as are accepted by the body of civilised nations. It is unnecessary to enter into the motives which actuated the Russian government[1]; but it is impossible to admit that the doctrines which it put forward received any higher sanction at the time than such as could be imparted by an agreement between the Baltic Powers. The accession of France, Spain, Holland, and the United States was an act of hostility directed against England, with which they were then at war, and was valueless as indicating their settled policy, and still more valueless as manifesting their views of existing international right. It was the seizure by Spain of two Russian vessels laden with wheat which was the accidental

[1] The intrigues which led to the issue of the Russian Declaration are sketched by Sir R. Phillimore, iii. § clxxxvi; see also Lord Stanhope, Hist. of Eng. chap. lxii.

PART IV CHAP. V cause of the original Declaration, and within a few months of adhering to the league France had imposed a treaty upon Mecklenburg, and Spain had issued an Ordinance, both of which were in direct contradiction to parts of the Declaration[1]. The value of Russian and Austrian opinion in the then position of those countries as maritime powers is absolutely trivial. Whatever authority the principles of the Armed Neutrality possess, they have since acquired by inspiring to a certain but varying extent the policy of France, the United States, Russia, and the minor powers.

France. On the outbreak of war between France and England in 1793, the Convention decreed that neutral vessels laden with provisions destined to an enemy's port should be brought in for preemption of the cargo[2], although treaties were then existent between France and the Hanse Towns, Hamburg, the United States, Mecklenburg, and Russia, in which it was stipulated that provisions should not be contraband of war. But the Prize Courts seem to have acted upon the rules of the Ordinance of 1681[3]; and of the few treaties which have been concluded by France during the present century, only one varies from the form which is usual in her conventions[4].

United States. The conduct of the United States has been less consistent. Between 1778 and the end of the eighteenth century they concluded four treaties, by which munitions of war, horses, and sulphur or saltpetre, or both, were ranked as contraband; and provisions, money and metals, ships and articles of naval construction, were declared to be innocent[5]. The treaty of 1794 with England includes naval stores among objects of contraband, and provides,

[1] All the signataries to the Declaration of the Armed Neutrality violated one or other of its provisions when they were themselves next at war.

[2] Phillimore, iii. § cxlv. The decree was issued on May 9, and the English Instructions to the like effect were dated June 8.

[3] Il Volante, Pistoye et Duverdy, i. 409.

[4] The convention with Denmark made in 1842 includes naval stores. Phillimore, iii. § cclx.

[5] France, 1778 (De Martens, Rec. ii. 598); Holland, 1782 (id. iii. 451); Sweden, 1783 (ib. 569); Spain, 1795 (id. vi. 561).

when 'provisions and other articles not generally contraband are seized,' that they shall not be confiscated, but that the owner shall be indemnified[1]. But the government of the United States did not look upon provisions as incapable of entering the class of prohibited articles under special circumstances; for in 1793, while protesting against the Instructions issued by England in June of that year, it argued against them on the ground that provisions can only be contraband when carried to a place which is actually invested, and which therefore there is a well-founded expectation of reducing by famine[2]. And it fully recognised that materials of naval construction are contraband by the common usage of nations[3]. In a case arising out of the subsequent war with England, the Prize Courts of the United States held that provisions 'destined for the army or navy of the enemy, or for his ports of naval equipment,' were to be deemed contraband[4].

Practice in the nineteenth century. United States.

In the nineteenth century a treaty of the United States with England retains naval stores and saltpetre, and is silent upon other points; another with Sweden includes sulphur and saltpetre, excluding naval stores; a third with France follows the terms affected by the latter power; and fourteen treaties, all, with one exception, contracted with American States, mention munitions of war and horses; and treat provisions, money, metals, ships, and articles of naval construction as innocent[5]. Those with

[1] De Martens, Rec. v. 674.

[2] Mr. Randolph to Mr. Hammond, May 1, 1794, American State Papers, i. 450.

[3] Mr. Pickering to Mr. Pinckney, Jan. 16, 1797, American State Papers, i. 560.

[4] Maisonnave v. Keating, ii Gallison, 335; The Commercen, i Wheaton, 387 [followed in the Bénito Estenger, 176 United States Reports, p. 573, a case arising out of the Spanish-American War of 1898].

[5] England, 1806 (De Martens, Rec. viii. 584); France, 1800 (id. vii. 202); Columbia, 1824 (Nouv. Rec. vi. 996); Sweden, 1827 (id. vii. 279); and in identical terms with Central America, 1826; Brazil, 1828; Chili, 1832; Venezuela, 1836; Peru-Bolivia, 1836; Ecuador, 1839; New Grenada, 1848; Guatemala, 1849; Peru, 1851 and 1870; Italy, 1871. The treaty with Mexico was made in 1831 (Nouv. Rec. x. 338); and that with San Salvador in 1849 (ib. xv. 74).

Mexico and San Salvador contain the special stipulation that provisions destined to a besieged port are to be excepted from the usual immunity. It would seem, on the whole, that the United States have always recognised the English doctrine of contraband to be more in consonance with existing usage than that of France, but that they have wished in certain cases to limit the application of the rule by express convention.

The practice of the Baltic States is of less interest, because the events of the revolutionary wars tended greatly to reduce their maritime importance; but before the antecedent conditions had been altered, Denmark varied the definition of contraband to which she had bound herself by issuing in 1793 a proclamation of neutrality, in which horses, and 'in a general way, articles necessary for the construction and repair of vessels, with the exception, however, of unwrought iron, beams, boards and planks of deal and fir, are declared to be contraband[1].' The Second Armed Neutrality endeavoured to re-establish the doctrine of its predecessor; and part of the compromise which, after its destruction, was effected between the views of Russia and of England consisted in the recognition of the northern enumeration of prohibited articles; but in 1803 a fresh agreement was concluded between England and Sweden by which coined money, horses, ships, and manufactured articles serving immediately for their equipment, were declared liable to confiscation, while naval stores, the produce of either country, were to be brought in for pre-emption[2]. Since then the only treaties concluded by any of the Baltic States which materially deviate from the principles of the Armed Neutrality, are that made at Orebro between England and Sweden in 1812, which includes horses, money, and ships, and that signed between England and Denmark in 1814, by which naval stores as well as horses are declared to be contraband[3].

Second Armed Neutrality.

[1] v Wheaton, Appendix, 76.

[2] De Martens, Rec. viii. 91.

[3] De Martens, Nouv. Rec. i. 432 and 680. The other treaties defining contraband of war made by the Baltic powers during the last century

Great Britain.

Besides the treaties already mentioned, Great Britain has only twice entered into special agreements with reference to contraband since the beginning of the nineteenth century[1]; and as almost all her previous contracts have been dissolved by war, her practice is mainly to be sought in the decisions of her Prize Courts. These persistently carried out, through the whole of the Revolutionary and Napoleonic wars, the traditionary principles upon which England had always before acted, of classing as contraband not merely articles susceptible only of warlike employment, but also a large number of those *ancipitis usus*.

Opinions of modern jurists.

In presence of the foregoing facts some modern writers can assert, with curious recklessness, that England is the only power which for more than a century has refused to identify articles of contraband with munitions of war[2]. Kent, Wheaton, and Manning[3], on the other hand, state the results of custom with perhaps somewhat too exclusive a reference to English and American practice, and without sufficient endeavour to classify the objects which in a different measure and in their divers ways have been included among the prohibited acts.

are as follows: Denmark and Prussia, 1818 (De Martens, Nouv. Rec. iv. 534); Denmark and Brazil, 1828 (id. vii. 614); Sweden and the United States, 1827 (ib. 279); Prussia and Brazil, 1827 (ib. 470); Prussia and Mexico, 1831 (id. xii. 534).

[1] With Portugal in 1820, when munitions of war, sulphur, horses, money, and naval stores were classed as contraband; and with Brazil in 1827, when munitions of war and naval stores only were enumerated. De Martens, Nouv. Rec. iii. 211, and vii. i. 486.

[2] E. g. Hautefeuille, tit. viii. sect. ii. § 3. The process by which M. Hautefeuille arrives at his conclusions has the merit of boldness. He finds in the imaginary 'loi primitive,' to which he refers in every page with wearisome iteration, that contraband of war is 'expressly' confined to arms, &c. His assumption is readily supported by treaties, from the list of which those which conflict with his theory are excluded as destitute of authority; and he provides against the interference of unilateral acts by a like rejection of everything which militates against the simple dictates of the divine will. He is obliged, however, to admit that the divine law has not been strong enough to prevent the entry of saltpetre and horses into the established list of contraband.

[3] Kent, Comm. lect. vii; Wheaton, Elem. pt. iv. chap. iii. § 24; Manning, chap. vii.

Among continental jurists two currents of opinion are visible. Some writers strive to reduce the list of contraband within the narrowest dimensions, notwithstanding the increased variety of material which is applicable more or less immediately to the purposes of warfare. Their works show a love for theoretic neatness, and some detachment from the practical aspects of the subject[1]. Others, recognising the difficulty of making a fixed and restricted list of contraband, and the improbability that assent to any such list would be generally given, or if given would be adhered to in circumstances of temptation, retain the principle of variability, while in most cases giving evidence of a healthy wish to confine its effects within very moderate limits[2].

[1] Gessner, 92–6, 109, 160; Hautefeuille, tit. viii. sect. ii. § 6; Kleen, De la Contrebande de Guerre, Paris, 1893, p. 43. M. Kleen, in a spirit of compensation for limiting contraband to completed munitions of war, imposes the severest penalties upon the neutral state which fails to prevent its subjects from supplying them to a belligerent. The belligerent must not seize a marine engine capable only of use in a battle-ship, but he may use reprisals against a neutral country that refuses to acknowledge liability in respect of a single case of rifles which may have reached his enemy.

[2] Ortolan, for example (Dip. de la Mer, ii. 190), while refraining from forcing usage into any definite conclusion, owns himself to be of the opinion of those 'qui pensent que la liberté de commerce des neutres doit être le principe général, et qu'il ne doit y être apporté d'autres restrictions que celles qui sont une conséquence immédiate et forcée de l'état de guerre entre les belligérants.' He considers, looking at the matter 'au point de vue rationnel : que les armes et instruments de guerre quelconques, et les munitions de toute sorte servant directement à l'usage de ces armes, sont les seuls objets qui soient généralement et nécessairement contrebande de guerre ; que les matières premières ou marchandises de toute espèce propres aux usages pacifiques, bien qu'elles puissent servir également à la confection ou à l'usage des armes, instruments ou munitions de guerre, ne sont point comprises régulièrement dans cette contrebande ; que tout au plus est-il permis à une puissance belligérante, eu égard à quelque circonstance particulière de ses opérations militaires propres à justifier cette mesure, de traiter comme contrebande telle ou telle de ces marchandises ; mais qu'une telle assimilation ne doit être qu'une exception extraordinaire, limitée au cas où ces marchandises formeraient véritablement une contrebande déguisée ; que les vivres et tous les objets de première nécessité ne peuvent en aucun cas et pour quelque motif que ce soit être rangés dans la contrebande de guerre.'

'L'idée de la contrebande,' says Heffter (Le Droit Int. § 160), 'est une idée complexe, variable selon les temps et les circonstances, et qu'il est difficile de déterminer d'une manière absolue et constante. . . . D'après les usages

That the weight of opinion is in favour of the latter view there can be no question[1]; and it will be seen that the more important states have given no reason to suppose that they are willing to tie their hands by hard and fast rules, whatever restriction in

internationaux universels, la contrebande est exclusivement limitée aux armes, ustensiles et munitions de guerre, en d'autres termes aux objets façonnés et fabriqués exclusivement pour servir dans la guerre, non pas aux matières premières propres à la fabrication des objets prohibés. . . . Il y a une autre classe d'objets qui, dans les traites seulement et dans les lois intérieures de plusieurs nations, sont indiqués comme objets de contrebande.' This includes horses, all raw materials suited for the manufacture of arms and munitions of war, naval stores, and gold, silver and copper, whether coined or in ingots. 'On doit ranger dans la même catégorie certains objets nouveaux que les progrès de la science ont appliqués de nos jours aux besoins de la guerre. Telles sont les machines à vapeur, la houille,' &c. . . . 'On ne saurait prétendre' that commodities of the latter class 'portent nécessairement le caractère de contrebande. C'est seulement dans le cas où, par leur transport vers l'un des belligérants, le commerce neutre prend le caractère manifestement hostile, que l'autre belligérant a le droit d'empêcher de fait.' M. Heffter's doctrine may be somewhat confused, but its results in practice are evident.

M. Bluntschli, after a commonplace enumeration of articles which are strictly contraband, says (§ 805) that 'le transport d'objets servant aussi aux besoins des particuliers, habillements, sommes d'argent, chevaux, bois de construction pour les navires, toile à voiles, plaques de fer, machines à vapeur, charbon de terre, navires de commerce, &c., est dans la règle autorisé. On ne pourra exceptionnellement envisager ces objets comme contrebande de guerre que si . . . on peut démontrer qu'ils étaient destinés à faire la guerre et transportés avec l'intention de prêter aide et assistance à l'un des belligérants. Les chevaux, par exemple, devront servir à remonter la cavalerie, les bois et le fer à construire des navires de guerre et à les blinder,' &c. As a comment upon this it may be worth while to quote some remarks which Dana makes with the strong common sense which distinguishes him. 'The intent of the owner,' he says, 'is not the test. The right of the belligerent to prevent certain things from getting into the military use of his enemy is the foundation of the law of contraband; and its limits are in most cases the practical result of the conflicts between this belligerent right on the one hand and the right of the neutral to trade with the enemy on the other.' Note to Wheaton, No. 226.

[1] The Institut de Droit International in 1877 resolved that '—sont toutefois sujets à saisie: les objets destinés à la guerre ou susceptibles d'y être employés immédiatement. Les gouvernements belligérants auront, à l'occasion de chaque guerre, à déterminer d'avance les objets qu'ils tiendront pour tels' (Annuaire for 1878, p. 112).

Among recent writers Geffcken, in Holtzendorff's Handbuch (1889), v. 719–24, ably and exhaustively discusses the question of contraband character. See also M. F. de Martens; Traité de Droit Int. iii. 351.

certain particulars it is possible that some of them, as for example Russia, may be anxious to place in their own interests upon the list of contraband[1].

[1] In Mr. Holland's British Admiralty Manual of Prize Law (1888) it is stated that 'it is part of the prerogative of the Crown during the war to extend or reduce the lists of articles to be held absolutely or conditionally contraband.' For the present the following goods are enumerated—

1. As absolutely contraband—Arms of all kinds and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone, also gun cotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, and ship timber, hemp and cordage, sailcloth, pitch and tar, copper fit for sheathing vessels, marine engines and the component parts thereof, including screw-propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire-bars, marine cement and the materials used in the manufacture thereof, as blue lias and Portland cements, iron in any of the following forms—anchors, rivet iron, angle iron, round bars of from ¾ to ⅝ of an inch diameter, rivets, strips of iron, sheets, plate iron exceeding ¼ of an inch, and Low Moor and Bowling plates.

2. As conditionally contraband—Provisions and liquors fit for the consumption of army or navy; money; telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, &c.; coals; hay; horses; rosin; tallow; timber.

For recent conduct on the part of France, see postea, p. 662. Russia objected at the West African conference to coal being considered contraband in any circumstances whatever (Parl. Papers, Africa, No. iv. 1885, 132 and 119), but she adheres to the principle of variability, since she made no objection to the inclusion of other objects *ancipitis usus*, and in May 1877 the articles which were to be considered contraband during the war with Turkey, which was then opening, were defined by Ukase. It appears from an answer quoted by Geffcken (loc. cit.) as having been given by Prince Bismarck to a deputation of Hamburg merchants, that the latter considers it to be for belligerent powers to 'in jedem einzelnen Falle nach Massgabe der Oertlichkeit und ihrer Interessen diejenigen Waaren bezeichnen, welche sie während der Dauer der Feindseligkeiten als Contrebande zu behandeln beabsichtigen.'

[In 1896 the Institut de Droit International drafted a set of rules to govern international practice with regard to contraband of war. By this 'réglementation' it is proposed to do away with 'les prétendues contrebandes désignées sous les noms, soit de contrebande *relative*, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligérant dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande accidentelle, quand lesdits articles ne servent spécialement aux buts militaires que dans une circonstance particulière.' The right of pre-emption,

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Contraband not restricted to munitions of war.

Upon the abstract merits of the question it is impossible to refuse sympathy to the more theoretical writers. They aim at giving the largest freedom that can be secured to the commerce of neutrals; in other words they aim at freeing the trade of persons who, taken in bulk, are probably injured by the mere existence of war, from additional injuries inflicted through the restraints imposed by belligerents for their own selfish objects. But it is useless to represent as law, or to propose as future law, rules which states are not ready to accept; and it is idle to expect them to adopt rules which do not correspond with belligerent exigencies.

If these exigencies be taken instead of theory, as a starting-point for definition of contraband, the proposition that contraband cannot be limited to munitions of war, and that the articles composing it must vary with the circumstances of particular cases, becomes the simple expression of common sense. There can be no question that many articles, of use alike in peace and war, may occasionally be as essential to the prosecution of hostilities as are arms themselves; and the ultimate basis of the prohibition of arms is that they are essential. The reason that no difference of opinion exists with respect to them is the fact that they are in all cases essential. But it may also happen, after a remote non-manufacturing country, such as Brazil, has suffered a disaster at sea, that to prevent the importation of marine engines would be equivalent to putting an end to the war, or would at least deprive the defeated nation of all power of actively annoying its enemy. Marine engines then become as essential as arms. In considering the matter logically therefore the mind must chiefly be fixed upon the characteristic of essentiality; and in determining under what circumstances the seizure of merchandise of double use can be justified the main difficulty is either to find a general test of essentiality, or in a given instance

however, is reserved to the belligerent in the case of objects *ancipitis usus* seized while on the road towards a port of his adversary.—Annuaire for 1896, p. 230.]

to secure adequate proof that delivery of particular articles would be essential to the prosecution of the war.

While the exigencies of belligerency must primarily control the definition of contraband, and therefore to a great extent settle the list of contraband merchandise, there is a point at which accepted law offers a barrier to further dictation on their part. Except to the limited degree which has been indicated in treating of belligerent rights, acts of war cannot be directed against the non-combatant population of an enemy state. Hence seizure of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population. In theory it is easy to distinguish between merchandise which, by its nature and the absence of a certain kind of destination, is presumably intended for civil use, and merchandise which, by its nature or clear destination, is obviously intended for use by the armed forces of the state. A general test is thus provided. In practice the difficulty need hardly be greater. Cases of permissible seizure might consequently be readily separated from those in which seizure is unwarrantable, could usage be set altogether aside. This however cannot with propriety be done. The policy of nations has, it is true, been governed by no principle; the wish to keep open a foreign market has generally been a motive quite as powerful as the hope of embarrassing an enemy; practice is thoroughly confused. Still practice cannot be devoid of authority, and it must be subjected to analysis in a spirit of willingness to give due value to any custom that may appear to have fairly established itself. On the other hand, in view of the exceptional confusion and arbitrariness by which practice is marked, it may reasonably be regarded as of secondary value, and appeal may in the first instance be made to principle. If an inquiry into the due range of contraband be conducted in this manner, it will be possible to classify broadly articles other than munitions of war according to the greater or less intimacy of their association with warlike operations, and consequently,

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abroad, and more necessarily so as the magnitude of armies increases. Almost every imported horse is probably bought on account of the government; if in rare instances it is not, some other horse is at least set free for belligerent use.

The amount of authority and of reason in favour of including saltpetre and sulphur is approximately the same as that which governs the case of horses. But there are no treaties in which these commodities are expressly excluded.

They are not now of so much importance as formerly, but the principle upon which saltpetre and sulphur are included of course covers also materials necessary to the manufacture of the various kinds of explosives which have been invented of late, and which are yearly increasing in number.

Materials of naval construction.

Materials of naval construction, e.g. ship timber, masts, spars of a certain size in a manufactured state, marine engines, or their component parts, sailcloth, cordage, copper in sheets, hemp, tar, &c., have been deemed contraband by less general consent. English usage bars all such objects from reaching the enemy, but does not treat them as being all equally harmful. Manufactured articles are looked upon with more suspicion than raw material; and where commodities are the staple produce of the exporting country and owned by persons belonging to it, the penalty of confiscation is relaxed, and they are subjected only to pre-emption[1]. The American rule on the subject is identical with that of England, and the Confederates also acted upon it during the Civil War[2]. In the course of a dispute with Spain in 1797, the details of which are unimportant, the government of the United States laid down that 'ship timber and naval stores are by the law of nations contraband of war,' and the

[1] Jonge Margaretha, i Rob. 193; Maria, i Rob. 373. So late as 1750 pitch and tar, the produce of Sweden, were confiscated by the English courts. The Apollo, iv Rob. 161; The Twee Juffrowen, iv Rob. 243.

During the Crimean War Sir J. Graham stated the opinion of the government that by the law of nations, timber, cordage, pitch, and tar could be dealt with as contraband of war. Hansard, 3rd series, vol. cxxxiv. 916.

[2] Dana's Wheaton, note No. 226; The Commercen, i Wheaton, 143; Ortolan, Dip. de la Mer, vol. ii. Appendix xxi.

courts give expression to a like view. The custom of France has now become fixed in an opposite sense[1]. The policy of the Northern States, which have always exported their timber and tar, can only be confirmed by the modern necessity of importing machinery[2]. The views of the South American world are probably indicated by its treaties with the United States, the tenor of which is thoroughly in consonance with the interests of the southern nations. Writers are divided into two classes, the members of which correspond to those whose diverse opinions as to horses have already been cited. In practice, therefore, the maritime authority of England and America is opposed by that of France, supported by a crowd of nations, the future nature or importance of the naval action of many of which cannot at present be foretold. Upon reasonable grounds it would appear that it must always be a matter of the highest and most immediate belligerent importance for a non-manufacturing state to import machinery in safety, and for a country poor in forests or in iron to be able to introduce ship timber and armour plates. It need hardly be pointed out that while the principle remains unaltered, under which materials apt for the construction of warships used reasonably to be confiscated, not only will the lists of noxious articles be found in the next maritime war to need large revision by the addition of new objects and the excision of others which have fallen out of use, but the relative importance of those which are continued from the old list will be found to have greatly changed. [In the Spanish-American War of 1898 the Navy Department of the United States, in their instructions to 'Blockading vessels and cruisers,' included among articles conditionally contraband 'Provisions when destined for an enemy's ship or ships, or for a place that is besieged.' The Spanish government enumerated as articles contraband of war: 'Cannons, machine guns, mortars,

[1] Pistoye et Duverdy, i. 445; Il Volante, ib. 409; La Minerve, ib. 410.

[2] The Swedish neutrality ordinance of 1854 only mentions as contraband munitions of war, saltpetre, and sulphur. Neut. Laws Commissioners' Rep., Appendix iv.

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guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, saltpetre, sulphur, dynamite and every kind of explosive, articles of equipment like uniforms, straps, saddles, and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of warships, and in general all warlike instruments, utensils, tools and other articles, and whatever may hereafter be determined to be contraband.']

Ships.

The position occupied by vessels in modern practice has already been so fully discussed under the head of State Duties, that it does not seem necessary to recur to the subject.

Coal.

Coal, owing to the lateness of the date at which it has become of importance in war, is the subject of a very limited usage. In 1859 and 1870 France declared it not to be contraband; and according to M. Calvo the greater number of the secondary states have pronounced themselves in a like sense. England on the other hand, during the war of 1870, considered that the character of coal should be determined by its destination, and though she refuses to class it, as a general rule, with contraband merchandise, vessels were prohibited from sailing from English ports with supplies directly consigned to the French fleet in the North Sea. Germany went further, and remonstrated strongly against its export to France being permitted by the English government[1]. The claim was extravagant, but the nation which made it is not likely to exclude coal from its list of contraband. More recently, during the West African Conference of 1884, Russia took occasion to dissent vigorously from the inclusion of coal amongst articles contraband of war, and declared that she would 'categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition' as such[2].

The view taken by England is unquestionably that which is

[1] Calvo, § 2460; Bluntschli, § 805; Hansard, 3rd series, vol. cciii. 1094; State Papers, Franco-German War, 1870, No. 3.

[2] Parl. Papers, Africa, No. iv, 1885, 132.

most appropriate to the uses of the commodity with which it deals. Coal is employed so largely, and for so great a number of innocent purposes, the whole daily life of many nations is so dependent on it by its use for making gas, for driving locomotives, and for the conduct of the most ordinary industries, that no sufficient presumption of an intended warlike use is afforded by the simple fact of its destination to a belligerent port. But on the other hand, it is in the highest degree noxious when employed for certain purposes; and when its destination to such purposes can be shown to be extremely probable, as by its consignment to a port of naval equipment, or to a naval station, such as Bermuda, or to a place used as a port of call, or as a base of naval operations, it is difficult to see any reason for sparing it which would not apply to gunpowder. One article is as essential a condition of naval offence as is the other[1]. As will be seen directly, France has endeavoured within the last few years to treat as contraband an article so much more innocent in the circumstances than coal could be, that she at least must be regarded as estopped from further alleging its total exemption.

Provisions.

The doctrine of the English courts at the commencement of the last century with respect to provisions was that 'generally they were not contraband, but might become so in circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it[2].' Grain, biscuit, cheese, and even wine, when on their way to a port of naval equipment or to a naval armament, were condemned, and, as has already been seen, the same practice was followed by the courts of the United States[3]. In 1793 and 1795, the English government indefen-

[1] The above view is that which was taken by Lords Brougham and Kingsdown in 1861 in a discussion in the House of Lords upon the Proclamation of Neutrality issued by the English government at the outbreak of the American Civil War. Hansard, 3rd series, vol. clxii. 2084 and 2087. Coal is at present included by England in the list of articles conditionally contraband, see Admiralty Manual of Prize Law (1888), p. 20, and antea, p. 654.

[2] The Jonge Margaretha, i Rob. 193.

[3] The Ranger, vi Rob. 125; The Edward, iv Rob. 69. For the American practice, see antea, pp. 648 and 659.

PART IV CHAP. V sibly extended the application of the doctrine to the point of seizing all vessels laden with provisions which were bound to a French port, alleging as their justification that there was a prospect of reducing the enemy by famine. A serious disagreement occurred in consequence with the United States, which maintained that provisions could only be treated as contraband when destined for a place actually invested or blockaded; and the point remained wholly unsettled by the Treaty of 1794, which, while recognising that provisions, under the existing law of nations, were capable of acquiring the taint of contraband, did not define the circumstances under which the case would arise[1]. The excesses of the English government cast discredit on the doctrine under the shelter of which they screened themselves. Manning adopts it, but not without evident hesitation. Wheaton seems to think that provisions can only be contraband when sent to ports actually besieged or blockaded; and MM. Ortolan, Bluntschli, and Calvo declare this to be undoubtedly the case[2]. Until lately no nation except England had pushed its practice even to the point admitted in the American courts, and England itself had long regarded its own doctrine of 1793 as wholly untenable; but in 1885 the doctrine was revived to its fullest extent by a country which has been in the habit of including a very narrow range of articles in its list of contraband. France, during her hostilities of that year with China, declared shipments of rice destined for any port north of Canton to be contraband of war. The pretension was resisted by Great Britain on the ground that though, in particular circumstances, provisions may acquire a contraband character, they cannot in general be so treated. In answer the French government alleged that a special circumstance of such kind as to justify its action was supplied by the fact of 'the importance of rice in the feeding

[1] De Martens, Rec. v. 674.

[2] Manning, 361–72; Wheaton, Elem. pt. iv. chap. iii. § 24; Ortolan, Dip. de la Mer, ii. 191 and 216; Bluntschli, § 807; Calvo, § 2452. Phillimore (iii. §§ ccxlvi–lviii) seems to look upon the practice of the English and American courts as being the most authoritative part of a confused usage.

of the Chinese population' as well as of the Chinese armies. Thus they implicitly claimed that articles become contraband, not by their importance in military or naval operations, but by the degree in which interference with their supply will put stress upon the non-combatant population. Lord Granville notified that Great Britain would not consider itself bound by the decision of any Prize Court which should give effect to the doctrine put forward by France; but no opportunity was afforded for learning whether the French courts would have upheld the views of their government, as no seizure was made during the short remainder of the war; shipments of rice, it would seem, were entirely stopped by fear of capture[1].

The topic of the admissibility of provisions in general to the list of contraband of war may be put aside as one which is not open to serious argument. Further than this, it cannot be doubted for a moment, not only that the detention of provisions bound even to a port of naval equipment is unauthorised by usage, but that it is unjustifiable in theory. To divert food from a large population, when no immediate military end is to be served, because it may possibly be intended to form a portion of supplies which in almost every case an army or a squadron could complete from elsewhere with little inconvenience, would be to put a stop to all neutral trade in innocent articles. But writers have been satisfied with a broad statement of principle, and they have overlooked an exceptional and no doubt rare case, in which, as it would seem, provisions may fairly be detained or confiscated. If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required

[1] Parl. Papers, France, No. i, 1885. Dr. Geffcken says (Holtzendorff's Handbuch (1889), iv. 723), 'man kann Lord Granville nur dankbar sein, dass er das gute Recht der Neutralen so entschieden gegen französische Willkür vertheidigt hat.' M. Calvo, in the last edition of his work (Droit Int. iv. 23), says, 'nous nous croyons fondés à poser en principe que le commerce des denrées alimentaires reste essentiellement libre en temps de guerre.'

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by ships, and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army. Detention of provisions is almost always unjustifiable, simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they, and everything else which directly and to an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but except in a particular juncture of circumstances their noxiousness cannot be proved [1].

Clothing, money, metals, &c.

Money and unwrought metals, and in general, clothing and its materials, are of like character with provisions, and in principle may become contraband under similar conditions; but under modern conditions it would very rarely be necessary to consign money directly to an army or fleet in a neutral vessel; and though uniforms, soldiers' great coats, &c., may offer some difficulty, since their destination and their use for warlike purposes is obvious, they are not, on the other hand, of such necessity in ordinary circumstances that the presence or absence of a particular consignment can be expected to affect in any way the issue of hostilities [2].

[1] The general doctrine in the text as to the capture of provisions bound to any ports of naval equipment, and the exceptions from it, were both upheld by the British government in the course of the above-mentioned correspondence with France. See Lord Granville's note of the 27th Feb., 1885. Parl. Papers, France, No. i, 1885.

[2] Manning (p. 358) thinks that metals and money are not contraband. The United States have gone so far as to regard cotton as contraband of war when, in their view, it took the place of money. 'Cotton was contraband of war, during the late Civil War, when it was the basis upon which the belligerent operations of the Confederacy rested.' 'Cotton was useful as collateral security for loans negotiated abroad by the Confederate government, or was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed, and its sale interdicted, except under regulations established by, or under contract with, the Confederate government. . . . . Cotton in fact was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare. In International Law, there could be no question as to the rights of the Federal commanders to seize it as contraband of war, whether they found it on rebel

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Penalties affecting contraband.

In strictness every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband[1].

territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of sinews of war, arms or general supplies.' Mr. Bayard, Sec. of State, to Mr. Murnaya, June 28, 1886. Wharton, Digest, iii. 438.

[1] Phillimore, iii. §§ cclxviii–lxx. Rules for ascertaining the value of the merchandise seized, and for other matters of detail connected with the practice, were laid down in the treaty between Great Britain and the United States in 1794, and in that between the former country and Sweden in 1803. MM. Heffter (§ 161) and Calvo (§§ 2517-8) look upon pre-emption not as a mitigation but as an intensification of the privileges of a belligerent; but they start with assuming that it is only used with respect to articles not contraband of war. That much of the merchandise to which pre-emption was applied during the wars of the end of the eighteenth century was not rightly considered to be contraband, does not alter the fact that, being considered to be contraband, it was lightly dealt with. M. Heffter however seems to admit that pre-emption may be permitted on payment not merely of ordinary mercantile profit, but of such profit as would probably be realised if the voyage were completed. M. Ortolan (ii. 220–30) understands the theory of the English practice, but is debarred by his views as to the proper definition of contraband from recognising any occasions on which it could be exercised. M. Bluntschli (§§ 806 and 811) thinks that 'contrebande de guerre ne peut être confisquée que lorsque les neutres prêtent secours et assistance à l'adversaire, c'est-à-dire lorsqu'ils agissent en ennemis; la saisie ne pourra avoir lieu lorsque les neutres font simplement du négoce.' To use his own example, if coal is found to be on its way to a port where a belligerent fleet is at anchor, it may be detained on compensation being made to the owner, but it cannot be confiscated unless the intention of delivering it to the enemy's fleet can be proved. He is silent as to any different rule being applied to munitions of war. He does not state where the authority for this doctrine is to be found; but as its adoption would be tantamount to sweeping away the whole law of contraband, it can hardly be admitted on the word of a single writer, however distinguished he may be. An ostensible destination to a belligerent government agent or to an armed

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Effect of contraband on the vessel carrying it.

The injuriousness to a belligerent of contraband trade by a neutral results from the nature of the goods conveyed, and not from the fact of transport. This distinction prevents the penalty which affects contraband merchandise from being extended as a general rule to the vessel in which it is[1]. Some writers consider that the neutral vessel has even a right to purchase the free continuance of her voyage at the price of abandoning to the belligerent whatever contraband goods she has on board, unless their quantity is so great that the captor cannot receive them. The existence of any such general right would be difficult to prove; but a large number of treaties have established the practice between certain nations[2]; and it was followed by the Confederate States during the American Civil War. It can scarcely be believed however that its vitality could stand the

force would hardly ever be necessary; and it is needless to say that merchandise would in consequence never be open to condemnation. And as a market with a good profit would be certain, whether the adventure were captured or arrived at its destination, no check would exist by which the trader could be restrained. Finally, as the merchant would be without risk, the belligerent would be relieved from the necessity of paying war-prices for his goods.

[1] The ancient practice, except in France, where, until 1681, goods were only seized on payment of their value, was to confiscate both cargo and ship. The Neutralitet, iii Rob. 295. And to this Russia seems to adhere; Russian Declaration, 1854, quoted by Lawrence in note to Wheaton, 573. In some treaties the freedom of the ship is expressly stipulated, e.g. in that between Denmark and Genoa, 1789. De Martens, Rec. iv. 443.

[2] It is provided for in the treaties between Russia and Denmark, 1782 (De Martens, Rec. iii. 476); the United States and Sweden, 1783 (ib. 571); Austria and Russia, 1785 (id. iv. 78); England and France, 1786 (ib. 172); France and Russia, 1787 (ib. 212); Russia and Two Sicilies, 1787 (ib. 238); Russia and Portugal, 1787 (ib. 329); United States and France, 1800 (id. vii. 104); Russia and Sweden, 1801 (ib. 332); United States and Central America, 1825 (Nouv. Rec. vi. 834); United States and Brazil, 1828 (id. ix. 61); United States and Mexico, 1831 (id. x. 339); United States and Venezuela, 1836 (id. xiii. 558); United States and Peru, 1836 (id. xv. 119); United States and Ecuador, 1839 (Nouv. Rec. Gén. iv. 315); France and Ecuador, 1843 (id. v. 172); France and New Grenada, 1844 (id. vii. 620); France and Guatemala, 1848 (id. xii. 11); United States and New Grenada, 1848 (id. xiii. 653); United States and San Salvador, 1850 (id. xv. 74); the Argentine Republic and Peru, 1874 (id. 2e sér. xii. 448). Russia seems no longer to hold the views of which she was an apostle in the end of the eighteenth century; see last note and antea, pp. 647, 657.

rude test of a serious maritime war. Dana observes with great truth that 'as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband not to claim it in court, the captor is entitled for his own protection to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all the papers and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law.' In face of these difficulties he is inclined to think that even the treaties can only apply to cases in which 'there is a capacity in the neutral vessel to insure the captor against a claim to the goods [1].'

The more common practice is to take the vessel with its cargo into a port of the captor, where the articles of contraband are duly condemned; but the vessel itself is ordinarily visited with no further penalty than loss of time, freight, and expenses [2]. If however the ship and the cargo belong to the same owners, or if the owner of the former is privy to the carriage of the contraband goods, the vessel is involved in their fate [3]. Ships have also

[1] Dana's Wheaton, note No. 230. Bluntschli (§ 810), Calvo (§ 2502), and Hautefeuille (tit. xiii. chap. i. sect. i. § i) elevate the practice into a neutral right. Ortolan (Dip. de la Mer, ii. 203) is more cautious. In the scheme of the Institut de Droit International for a Règlement des Prises Maritimes, it is provided that 'le navire arrêté pour cause de contrebande de guerre peut continuer sa route, si sa cargaison ne se compose pas exclusivement, ou en majeure partie, de contrebande de guerre, et que le patron soit prêt à livrer celle-ci au navire du belligérant et que le déchargement puisse avoir lieu sans obstacle selon l'avis du commandant du croiseur.' Ann. de l'Institut, 1883, p. 218.

[2] Wheaton, Elem. pt. iv. chap. iii. § 26; Phillimore, iii. § cclxxv; The Sarah Christina, i Rob. 242; Heffter, § 161.

[3] Wheaton, Phillimore, and Heffter, loc. cit.; Bluntschli, § 810. Ortolan (Dip. de la Mer, ii. 199) argues that it is immaterial whether the vessel and the cargo belong to the same person or not. In the usual theory, 'le fond de la pensée serait toujours de traiter le commerçant en ennemi, de dire : Nous tenons tes biens, quels qu'ils soient, nous les gardons. Mais nous le répétons, il n'est pas ennemi, il est commerçant ; il ne s'agit pas d'actes d'un gouvernement qui romprait la neutralité, mais d'actes de particuliers qui exercent leur

been condemned for having on board articles contraband under a treaty to which their country was a party; and for the fraudulent circumstances of false papers and false destination [1].

On innocent goods in the same vessel.

The principle which, according to the English practice, governs the treatment of innocent merchandise found on board a ship engaged in the transport of contraband, is identical with that which affects the vessel itself. 'The law of nations,' said Lord Stowell, 'in my opinion is, that to escape the contagion of contraband, the innocent articles must be the property of a different owner [2].'

Within what time the penalty attaches.

It is universally admitted that the offence of transporting contraband goods is complete, and that the penalty of confiscation attaches, from the moment of quitting port on a belligerent destination; and a destination is taken to be belligerent if it is not clearly friendly; a vessel is not permitted to leave her course open to circumstances, and to make her destination dependent on contingencies. If in any contingency she may touch at a hostile port she is regarded as liable to capture; she can only save herself by proving that the contingent intention has been definitively abandoned [3].

English doctrine of continuous voyage.

During the American Civil War the courts of the United States gave a violent extension to the notion of contraband destination, borrowing for the purpose the name of a doctrine of the English courts, of wholly different nature from that by which they were themselves guided. As has already been stated [4], it was formerly held that neutrals in a sense aided

trafic.' It seems to me that M. Ortolan's reasoning is sound; but it may be doubted if the current practice is likely at present to be disturbed.

[1] The Neutralitet, iii Rob. 296; The Franklin, iii Rob. 224.

Ortolan argues (Dip. de la Mer, ii. 220-2), but not convincingly, against condemnation for fraud. He sums up his views by saying, 'Dans notre opinion la confiscation pour contrebande de guerre ne peut s'appliquer qu'aux articles prohibés et jamais au navire innocent ni à la cargaison innocente.'

[2] The Staadt Embden, i Rob. 31.

[3] The Imina, iii Rob. 167; Trende Sostre, cited in The Lisette, id. vi. 390 n.

[4] Antea, p. 634.

in the hostilities of a belligerent by taking advantage of permission given by him to carry on a trade which was forbidden to them in time of peace. Property engaged in such trade was therefore deemed to be confiscable. During the Anglo-French wars of the revolution traders foreign to France or Spain were permitted to trade between French and Spanish ports and French and Spanish colonies, commerce with the colonies in question having before the war been restricted to trade with foreign ports and the colony. To evade the liability to condemnation in the English courts which entering into the new trade involved, neutral merchants endeavoured to give an air of innocence to their ventures by making a colourable importation into some port from which trade with the colony or the home country was permissible. Thus a cargo taken on board at La Guayra was brought to Marblehead in Massachusetts, was landed, re-embarked in the same vessel with the addition of some sugar from the Havannah, and within a week of its arrival was despatched to Bilbao[1]. In this and in like cases the English courts condemned the property; but they were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon; cargo was confiscated only when captured on its voyage from the port of colourable importation to the enemy country. The doctrine upon which the English courts acted was called by Lord Stowell the doctrine of continuous voyage.

American doctrine of continuous voyage.

By the American courts this idea of continuous voyage was seized upon and applied to cases of contraband and blockade. Vessels were captured while on their voyage from one neutral port to another, and were then condemned as carriers of contraband or for intent to break blockade. They were thus condemned not for an act—for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole—but on mere suspicion of intention

[1] The William, v Rob. 385; and see the Maria, ib. 365, and the cases reviewed in the judgment [more particularly the Essex].

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to do an act. Between the grounds upon which these and the English cases were decided there was of course no analogy.

The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country. On the confession indeed of one of the judges then sitting in the Supreme Court they seem to have been due partly to passion and partly to ignorance. 'The truth is,' wrote Mr. Justice Nelson, ten years later, 'that the feeling of the country was deep and strong against England, and the judges as individual citizens were no exceptions to that feeling. Besides, the court was not then familiar with the law of blockade [1].'

[1] Letter to Mr. Lawrence of August 4, 1873, quoted by Sir Travers Twiss, Law Mag. and Rev. 4th Ser. iii. 31. [The American decisions cited by Mr. Hall are the Bermuda, iii Wallace 59, and the Springbok, id. v. 1. To these should be added the Peterhoff, v Wallace 28, in which case goods of a contraband character, whose primary destination was the port of Matamoras, on the Mexican shore of the Rio Grande, were condemned on the ground that they were intended to be carried inland into territory then forming part of the Southern Confederacy and consequently hostile. The court declared that the conveyance by neutrals to belligerents of contraband articles is always unlawful, and that such goods may always be seized during transit by sea. On the only occasion since the date of these cases (1863-65) in which a British government has been confronted with the question of contraband carried by a neutral it has followed the doctrine laid down in the Springbok, and as regards the liability to seizure in transit of contraband goods whose ultimate destination is a hostile territory its position is hardly to be distinguished from that of the American Prize Courts.

During the recent South African War it was matter of notoriety that the Dutch Republics received supplies of men, arms and munitions through the port of Lorenço Marques, on Delagoa Bay, which belonged to Portugal, a neutral power, and was connected by forty miles of railway with the Transvaal frontier. As neither the Transvaal nor the Orange Free State possessed any seaboard the prevention of this traffic by blockade was impossible, but the British government maintained that neutral ships on the high seas were subject to visit and search in cases where there was ground for suspecting that they carried contraband of war among the cargo or combatants among the passengers. In December 1899 and January 1900 three German vessels, the Herzog, the General, and the Bundesrath—the latter a mail steamer, and all belonging to the German East Africa Company—were seized in African waters on suspicion of carrying contraband of war and persons intending to join the Boer armies as combatants. The German government entered a strong protest, more particularly with regard to the Bundesrath as being a mail steamer; and though the circumstances

As a consequence of the doctrine that the goods are seized because of their noxious qualities, and not because of the act of

were eminently suspicious it did not appear, after search, that there was sufficient evidence either of the destination of the passengers or of the existence of contraband to justify further detention of the vessels or to send them before a prize court. Their release was ordered and compensation agreed upon for any losses incurred by German subjects. As the ships did not go before a prize court it became impossible to obtain a judicial ruling, and it remains to be seen whether, in similar circumstances, the English judges will feel themselves bound, as they did in Hobbs *v.* Henning, 18 C. B. N. S. 791, by the dictum of Lord Stowell in the Imina, that goods going to a neutral port cannot come under the description of contraband; or whether, in the words of Professor Holland (letter to the *Times*, Jan. 3, 1900), they will be prepared to make 'innovations which seem to be demanded by the conditions of modern commerce.'

Immediately on learning of the seizure of the Bundesrath, Count Hatzfeldt, the German Ambassador in London, was instructed to demand her release on the ground that 'whatever may have been on board the Bundesrath there could have been no contraband of war, since, according to the recognised principles of international law, there cannot be contraband of war in trade between neutral ports.' And in a letter to Lord Salisbury Count Hatzfeldt laid stress on a passage in the British Admiralty Manual of Prize Law which declared that 'a vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral,' and, that 'the destination of the vessel is conclusive as to the destination of the goods on board.' To this Lord Salisbury replied by pointing out that the Admiralty Manual, while stating in a convenient form the general principles by which naval officers are to be guided in the exercise of their duties, expressly refrained from treating of questions which would ultimately have to be disposed of by the Prize Court. The passage cited from it 'that the destination of the vessel is conclusive as to the destination of the goods on board,' had no application, Lord Salisbury contended, to such circumstances as had now arisen, and could not apply to contraband of war on board of a neutral vessel if such contraband was, at the time of seizure, consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country. The 'true view in regard to the latter category of goods is, as Her Majesty's Government believe, correctly stated in paragraph 813 of Professor Bluntschli's Droit International Codifié (French translation, 2nd edition): "Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée."' Lord Salisbury concluded by saying that the British government were unable to agree that there were grounds for ordering the release of the Bundesrath without examination, but that they had sent instructions by telegram requiring the senior naval officer on the spot to carry out the examination with as little delay as possible, and to show in doing so every consideration for the owner and the innocent passengers. Parliamentary Papers, Africa, No. 1 (1900). As we have seen,

the person carrying them, it is held that so soon as the forbidden merchandise is deposited, the liability which is its outgrowth is deposited also, and that neither the proceeds of its sales can be touched on the return voyage, nor can the vessel, although previously affected by her contents, be brought in for adjudication [1]. Some cases have however been decided in the English courts which go further. A contraband cargo, for example, having been taken to Batavia, with fraudulent papers and a fraudulent destination to Tranquebar, the return cargo was condemned on the ground that 'in distant voyages the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions, ab ovo usque ad mala.' And in a case in which contraband was carried, by means of false documents and suppression, to the Isle of France, whence the vessel went in ballast to Batavia, and subsequently sailed to various ports with more than one cargo before capture took place, it was even held that 'it is by no means necessary that the cargo should have been purchased by the proceeds of the contraband' carried on the outward voyage [2]. The doctrine of these cases is not approved of by Wheaton or by foreign jurists; and, while undoubtedly severe, it does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes.

the examination proved futile, the compensation was duly paid and the incident closed. It is unlikely that the exact circumstances of the Bundesrath and her consorts will ever be repeated or that we shall again find ourselves at war with a civilised power possessing no seaboard. But should we in the future become involved in hostilities with a maritime power it is certain that the interpretation of the questions grouped generally under the term of 'continuous voyage' will assume grave importance. And I venture to think that the attitude of whatever British government may be in office will tend rather to the views expressed by Lord Salisbury than to those enunciated by Mr. Hall; and that the destination of the cargo, not merely the destination of the vessel, will be the criterion.]

[1] The Imina, iii Rob. 168; Wheaton, Elem. pt. iv. chap. iii. § 26; Calvo, § 2465; Heffter, § 161.

[2] The Nancy, iii Rob. 16; The Margaret, i Acton, 335.

CHAPTER VI

ANALOGUES OF CONTRABAND

In what the carriage of analogues of contraband differs from that of contraband.

With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connexion with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the

PART IV CHAP. VI belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them.

When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. If a neutral, who has been in the habit in the way of his ordinary business of carrying post-bags to or from a belligerent port, receives sealed despatches with other letters in the usual bags, or if he even receives a separate bundle of despatches without special remuneration, he cannot be said to make a bargain with the belligerent, or to enter his service personally, for belligerent purposes. He cannot even be said to have done an act of trade of which he knows that the effect will be injurious to the other belligerent; despatches may be noxious, but they may also be innoxious; and the mere handing over of despatches to him in the ordinary course of business affords him no means of judging of their quality. A neutral accepting despatches in this manner cannot therefore be subjected to a penalty. Whether those which he takes under his care are exposed to seizure will be considered presently. When again a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him. The only questions to be considered are whether there is any usage compelling him to refuse to receive such persons if they are of exceptional importance, and consequently whether he can be visited with a penalty for receiving them knowingly, and whether, finally, if he is himself free from liability, they can be taken by their enemy from on board his vessel.

Carriage of despatches.

Despatches not being necessarily noxious, a neutral carrier is not necessarily exposed to a penalty for having made a specific bargain to carry them. He renders himself liable to it only when there is reasonable ground for belief that he is aware of their connexion with purposes of the war. As the bearer of letters cannot be assumed to be acquainted with their contents, the broad external fact of their destination is taken as the test of their character, and consequently as the main ground for fixing him with or exonerating him from responsibility. Two classes of despatches are in this manner distinctly marked. Those which are sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral state. The despatches are themselves exempt from seizure, on the ground that their transmission is as important in the interests of the neutral as of the belligerent country; and to carry them is therefore an innocent act[1]. Those on the other hand which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral state, may be presumed to have reference to the war; and the neutral is bound to act on the presumption. If therefore they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession or of the quality of the person to whom they are addressed. Letters not addressed to persons falling within either of the above categories are *primâ facie* innocent; if they contain noxious matter they can only affect the vessel when other facts in the case show the knowledge of the owner or master[2]. Thus,

[1] The Caroline, vi Rob. 461; The Madison, ii Edwards, 226; Ortolan, Dip. de la Mer, ii. 240; Calvo, § 603. Comp. Letter of Marque of the Confederate States, ap. Ortolan, ib. Append. xxi.

[2] In the statement, issued by the Russian government in 1877, of the rules

where official despatches of importance were sent from Batavia to New York, and were there given by a private person, enclosed in an ordinary envelope, to the master of an American ship, for transmission to another private person in France, the ship was released, on the oath of the captain that he was ignorant of the contents of the letters entrusted to him[1].

Carriage of persons in the

A neutral vessel becomes liable to the penalty appropriate to the carriage of persons in the service of a belligerent, either

by which it intended to guide its conduct during the war with Turkey, it is said that 'le transport de dépêches et de la correspondance de l'ennemi est assimilé à la contrebande de guerre.' Journal de St. Pétersbourg, $\frac{14}{26}$ Mai, 1877. No doubt it was not intended to fix the neutral who should unwittingly carry correspondence of the enemy government with the penalties attached to the carriage of contraband of war. It would however have been better had the intention of the Russian government been more clearly conveyed. Art. 34 of the scheme for a Règlement des Prises Maritimes of the Institut de Droit International lies open to a like criticism.

[1] The Rapid, Edwards, 228. The English courts have unfortunately sometimes given decisions inconsistent with the principle of this case, and have held that a vessel is not exempted from confiscation by having been violently pressed into the belligerent's service, so that the non-neutral act was involuntary, nor by deception on the part of the belligerent, so that the non-neutral act was unwittingly done. 'If an act of force exercised by one belligerent on a neutral ship or person is to be considered as sufficient justification for any act done by him contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If a loss is sustained in such a service, the neutral yielding to such demands must seek redress from the government which has imposed the restraint upon him.' The Carolina, iv Rob. 259. Nor is it necessary that the master shall be cognizant of the service on which he is engaged. 'It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. If imposition has been practised, it operates as force; and if redress in the way of indemnification is sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, as it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender.' The Orozembo, vi Rob. 436. Sir R. Phillimore maintains the authority of these cases; iii. § cclxxii. It is no doubt proper to throw upon the neutral the onus of proving his innocence, and to sift the evidence which he adduces with the most jealous suspicion; but to punish him for the acts of another person, of which he has been the unwilling or unconscious subject, is as useless as it is wrong. The belligerent cannot be intimidated by losses inflicted on his victim.

service of the belligerent.

when the latter has so hired it that it has become a transport in his service and that he has entire control over it; or when the persons on board are such in number, importance, or distinction, and at the same time the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war. In the case of the ship Friendship, a vessel was hired to bring home to France eighty-four shipwrecked officers and sailors. It was confiscated as a transport, because it appeared in evidence that the vessel was not permitted to take cargo, and that the French government had paid for the passage of the men; who were thus being carried, not as common passengers, but as a part of the French navy, from a port of the United States to a port in France. In another case a vessel sailed from Rotterdam to Lisbon, where it was ostensibly chartered by a Portuguese subject to carry cargo or passengers to Macao; no cargo was shipped, but after some time spent in fitting it for passengers with unusual care, three Dutch officers of rank embarked in it, not for Macao, but for Batavia. Lord Stowell, on the facts of the case, inferred that a contract had been entered into with the Dutch government before the vessel left Rotterdam, and condemned it[1].

In the transport of persons in the service of a belligerent, the essence of the offence consists in the intent to help him; if therefore this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. It is possible for a neutral carrier to become affected by responsibility for a transport effected to a neutral port, and it may perhaps be enough to establish liability that the persons so conveyed shall be in civil employment.

As a neutral vessel may be the bearer of despatches passing between a belligerent government and its diplomatic agents in

[1] The Friendship, vi Rob. 422; The Orozembo, ib. 433; Bernard, 224; Ortolan, Dip. de la Mer, ii. 234.

a neutral country, so also, and for the same reasons, the transport of diplomatic agents themselves is permitted.

Penalty incurred by the transport of analogues of contraband.

It will be remembered that in the case of ordinary contraband trade the contraband merchandise is confiscated, but the vessel usually suffers no further penalty than loss of time, freight, and expenses. In the case of transport of despatches or belligerent persons, the despatches are of course seized, the persons become prisoners of war, and the ship is confiscated. The different treatment of the ship in the two cases corresponds to the different character of the acts of its owner. For simple carriage of contraband, the carrier lies under no presumption of enmity towards the belligerent, and his loss of freight, &c., is a sensible deterrent from the forbidden traffic; when he enters the service of the enemy, seizure of the transported objects is not likely to affect his earnings, while at the same time he has so acted as fully to justify the employment towards him of greater severity [1].

Carriage of despatches in the ordinary way of trade.

Vessels not being subject to a penalty for carrying despatches in the way of ordinary business, packets of a regular mail line are exempted as of course; and merchant vessels are protected in like manner when, by municipal regulations of the country from the ports of which they have sailed, they are obliged to take on board all government despatches or letters sent from the post-offices [2].

Whether mail-bags ought to be exempt from search.

The great increase which has taken place of late years in the number of steamers plying regularly with mails has given importance to the question whether it is possible to invest them with further privileges. At present, although secure from condemnation, they are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post-bags may be seized on account of despatches believed to be within them. But the

[1] Ortolan, Dip. de la Mer, ii. 234; Wheaton, Elem. pt. iv. ch. iii. § 25; Phillimore, iii. § cclxxii; Heffter, § 161[a].

[2] Lawrence, note to Wheaton, pt. iv. chap. iii. § 25; Calvo, § 2530; Ortolan, ii. 240. Hautefeuille exaggerates the immunities of neutrals carrying despatches; tit. viii. sect. v. § 5.

secrecy and regularity of postal communication is now so necessary to the intercourse of nations, and the interests affected by every detention of a mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt now be shown in a naval war to mail vessels and their contents; and it may be assumed that the latter would only be seized under very exceptional circumstances. France in 1870 directed its officers that 'when a vessel subjected to visit is a packet-boat engaged in postal service, and with a government agent on board belonging to the state of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and despatches on board[1];' and it is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. At the same time it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary manner through its post-offices. To give immunity from seizure as of right to neutral mail-bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it; and it is not difficult to imagine occasions when the absence of such power might be a matter of grave

[1] Rev. de Droit Int. xi. 582. A treaty between England and Brazil of the year 1827 provides that packets are to be considered king's ships until a special convention on the subject is concluded. De Martens, Nouv. Rec. vii. 486: see also the Anglo-Belgian postal convention, and that of 1869 between France and Italy. In a series of postal conventions between England and France it has been agreed, first, that packets owned by the state should be treated as vessels of war in the ports of the two countries; next, that vessels freighted as packets by the governments of the respective states should be so treated; and, finally, that lines subsidised by them should have the same privileges. De Martens, Nouv. Rec. xiii. 107; Nouv. Rec. Gén. v. 183; Hertslet's Treaties, x. 108. The conventions between England and France, it will be observed, do not provide for the treatment of packets on the high seas. [In the case of the Panama, 176 United States Reports, p. 535, the Supreme Court of the United States refused to listen to the contention that the fact of carrying mails exempted an enemy merchant ship from capture.]

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importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral government on board that no despatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing.

No usage has hitherto formed itself on the subject. During the American Civil War it was at first ordered by the government of the United States that duly authenticated mail-bags should either be forwarded unopened to the foreign department at Washington, or should be handed after seizure to a naval or consular authority of the country to which they belonged, to be opened by him, on the understanding that documents to which the belligerent government had a right should be delivered to it. On the suggestion of the English government, which expressed its belief 'that the government of the United States was prepared to concede that all mail-bags, clearly certified to be such, should be exempt from seizure or visitation,' these orders were modified; and naval officers were directed, in the case of the capture of vessels carrying mails, to forward the latter unopened to their destination[1].

Carriage of persons in the ordinary way of trade.

The effect of the carriage of persons in the service of a belligerent by a neutral vessel in the ordinary way of trade depends upon the answer which has to be given to the question whether such persons can be assimilated to contraband of war. If they can be classed as a sort of contraband, they may be seized and brought in with the vessel on board of which they are found, and proof that they have been received with knowledge of their character will entail the same consequences to the ship as follow upon ordinary contraband trade. If they cannot be so classed, the vessel in which they are travelling remains a ship under neutral jurisdiction which has not been brought by the conduct

[1] See the correspondence in Bernard's Neut. of Great Britain, 319–23; Dana, note to Wheaton, No. 228.

of the persons having control over it within the scope of those exceptional rights in restraint of noxious trade which belligerents have been allowed to assume; the enemy of the belligerent travellers therefore is thrown back upon those ordinary rights which he possesses in time of peace; in other words, he can only seize the persons in question in the emergency of an immediate and pressing danger[1].

Case of the Trent.

The point came under discussion between England and the United States during the American Civil War. In 1861 Messrs. Mason and Slidell, who had been appointed diplomatic agents of the Confederate States at the Courts of St. James's and the Tuileries, came on board the English passenger steamer Trent at Havana, and sailed in her from there to St. Thomas's on their way to England. While passing through the Bahama Channel the vessel was boarded from the American frigate San Jacinto, and Messrs. Mason and Slidell were taken out of her and carried as prisoners to Boston, the Trent being allowed to continue her voyage. The English government demanded and obtained their immediate release, it being acknowledged by the United States that they had been unduly arrested. Lord Russell and Mr. Seward differed however in the view which they respectively took as to the reasons for which the capture was irregular.

Captain Wilkes, the commander of the San Jacinto, professed to regard Messrs. Mason and Slidell as embodied despatches. In the same spirit Mr. Seward, in an elaborate note addressed to Lord Lyons, declared them to be contraband, 'since the word means broadly, contrary to proclamation, prohibited, illegal, unlawful. All writers and judges,' he adds in an off-hand way, but without giving any proof of his assertion[2], 'pronounce naval or military persons in the service of the enemy contraband.' Mr. Seward then claimed that Messrs. Mason and Slidell were liable to capture. But he admitted that they were not properly

[1] Comp. antea, pp. 275 et seq.

[2] He refers to Vattel and Lord Stowell, but the passages which he paraphrases have no reference whatever to the point in question.

disposed of. If they were contraband of war, they and the vessel ought to have been sent in together for adjudication; a captor has no right to decide for himself whether particular things or persons are in fact contraband; to do so is the business of the courts, and a neutral state cannot be expected to acquiesce in the rough conclusions of a naval officer arrived at on the deck of the prize vessel. At this point Mr. Seward found himself confronted with an insuperable difficulty which he tried in vain to get over. If the captured persons had been really contraband, the courts would have had no difficulty in dealing with them whether the vessel were brought in or not. 'But Courts of Admiralty have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons; the courts can entertain no proceedings and render no judgment in favour of or against the alleged contraband men.' The presence of the vessel was necessary in order to place before the courts indirectly the question whether the men were contraband or not; and if that question, so raised, were settled adversely to the men, Mr. Seward acknowledged that the courts were incompetent to determine in what way they should be disposed of; that matter, he confessed, was 'still to be really determined, if at all, by diplomatic arrangement or by war.' Mr. Seward's own statement is conclusive against himself. The whole law of contraband, blockade, &c., is based upon the concession by the neutral state to the belligerent state and its courts of whatever jurisdiction is necessary for self-protection. To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them.

Lord Russell controverted the doctrine of Mr. Seward in a note which was also elaborate. He denied that the capture of Messrs. Mason and Slidell was simply irregular in its incidents, and maintained that they were not liable to capture at all; but

he rested the immunity which he claimed for them on the privilege of receiving diplomatic agents from belligerent states accorded by the practice of nations to neutral states, and on the necessity that contraband articles shall have a hostile, and not a neutral, destination; he even seems, by quoting without comment a passage from Bynkershoek, in which soldiers are classed with arms and other articles of use in war, to favour the view that at least persons who are in the military service of the state may be treated as contraband[1].

It is to be regretted that Lord Russell did not address himself to the refutation of the doctrine that persons can be contraband of war. For the reasons mentioned above, however, there need be no hesitation in rejecting it. In the words of Mr. Bernard, 'it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different.' If a vessel is so hired by a belligerent that he has entire control over it to the extent of his special needs, the ship itself is confiscable as having acquired an enemy character, and the persons on board become prisoners of war. If on the other hand belligerent persons, whatever their quality, go on board a neutral vessel as simple passengers to the place whither she is in any case bound, the ship remains neutral and covers the persons on board with the protection of her neutral character[2].

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. ix; but Bynkershoek is speaking rather of a general state duty to prevent its subjects from helping a belligerent than of the special question of contraband. In the next chapter, where he discusses what articles are contraband of war, he makes no mention of soldiers.

[2] Mr. Seward to Lord Lyons, Dec. 26, 1862, and Earl Russell to Lord Lyons, Jan. 23, 1862, ap. Bernard, 201 and 215. On the general doctrine see Bernard, 224; Bluntschli, § 817; Dana, note to Wheaton's Elem., No. 228; Marquardsen, Der Trentfall. The last-mentioned work may be consulted with advantage on the whole subject of the transport by neutrals of belligerent persons and despatches.

CHAPTER VII

CARRIAGE OF BELLIGERENT GOODS IN NEUTRAL VESSELS

Conflicting theories on the subject.

No branch of international law has been debated at such length or with greater keenness than those which refer to belligerent goods carried in neutral vessels, and to neutral goods in belligerent vessels. It is possible, and indeed probable, that the Declaration of Paris, to which most civilised states have adhered, has permanently secured an identical practice among the signataries to it, and that it will in time be definitively accepted by those states also which for the present have reserved the right to pursue their accustomed policy. But the terms of the Declaration are not strictly authoritative law, and it is therefore not yet superfluous to sketch, though more lightly than was formerly necessary, the history and the grounds of the rival doctrines which have been held upon the two subjects. Usually these subjects have been treated together, and the verbal jingle, 'Free ships, free goods; Enemy ships, enemy goods,' has been thought to express a necessary correlation, which has been equally supposed to exist between the contrary doctrines. The Declaration of Paris, in choosing from each system the part most favourable to neutrals, has at least restored their natural independence to two essentially distinct questions of law.

Two theories have been held, and two usages have existed, with respect to the treatment of belligerent goods in neutral vessels. In the simpler and primitive view they were enemy's goods, and therefore liable to seizure, wherever found outside the jurisdiction of a third state; according to a later and more artificial doctrine, the neutral vessel is invested with power to protect them.

Early usage.

The first of these doctrines is found in the *Consolato del Mare*, the rules of which embodied the customs authoritative in the western Mediterranean during the Middle Ages; and Louis XI, in writing to the King of Sicily, speaks of the principle as being in his time accepted beyond all question[1]. The French Ordonnances of 1538, 1543, and 1584, not only confiscated the hostile goods, but extended the penalty to the ship in which they were embarked, and though the courts appear to have avoided giving full effect to the law, their actual rules were not milder than those enforced by other nations[2]. It was not till 1650 that the principle of the immunity of goods carried in a neutral vessel was asserted or agreed upon. In that year a treaty was concluded between Spain and the United Provinces, in which it was agreed that the goods of the enemies of either party should be free from capture, when on board the ships of the other party, the latter being neutral; and in 1655 a treaty was made between France and the Hanse Towns, the language of which seems to convey the privilege[3], but its real meaning, as understood by one of the contracting parties, may probably be best read by the light of negotiations which took place some time before between France and the United Provinces. In 1646 a treaty had provided that for four years the Dutch government should be excepted from the operation of the Ordinances, and that 'their ships should free their cargo, notwithstanding the presence in it of merchandise, and even of grain and vegetables belonging to enemies, excepting always articles contraband of war.' On an attempt being made by De Witt in 1653 to take the plain

Practice in the seventeenth century.

[1] He says that it is a 'usus in hoc occidentali mari indelebiliter observatus, res hostium et bona, etiamsi infra amicorum aut confoederatorum triremes seu naves positae sint, nisi obstiterit securitas specialiter super hoc concessa, impune et licite jure bellorum capi posse;' quoted by Heffter, § 163.

[2] Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7. Grotius gave his sanction to the principle of the French Ordonnances: 'Neque amicorum naves in praedam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navis,' which of course would usually be the case. De Jure Belli et Pacis, lib. iii. c. vi. § vi. note.

[3] Dumont, vi. i. 571, and ii. 103.

meaning of these words as the ground of a permanent arrangement, it appeared that the French had merely understood the treaty of 1646 to preserve from confiscation the ship and neutral merchandise associated in its cargo with that of an enemy. It is not likely, as is remarked by Manning, that Louis XIV would grant larger immunities to the Hanse Towns than to Holland, and the treaty made with them in 1655 may therefore be no doubt interpreted in the same sense[1]. In 1659 a clause appears in the Peace of the Pyrenees, by which free ships are made to free goods, and during the remainder of the seventeenth century France concluded nine treaties, in which a like provision was contained[2]. But in the midst of these treaties the Ordonnance of 1681 proved how entirely they were exceptions to the general policy of the state, by re-enacting in all their severity the provisions of the law of 1584, and in 1661 and 1663 treaties were concluded with Sweden in which no stipulation inconsistent with it was contained[3].

The Dutch the promoters of the doctrine, Free ships, free goods.

The true promoters of the new principle were the Dutch, to whom the security of their carrying trade was of the deepest importance. They not only were the earliest people to stipulate for the freedom of enemy's cargo in neutral ships by a treaty of undoubted meaning, but they steadily kept it before their eyes as an object to be striven for, to such purpose that they induced Spain, Portugal, France, England, and Sweden to grant or confirm the privilege in twelve treaties between the years 1650 and 1700[4]. The only treaty of the century to which neither

[1] Dumont, vi. i. 342; Manning, 317.

[2] With Denmark, 1662 (Dumont, vi. ii. 439); Denmark, 1663 (ib. 463); United Provinces, 1662 (ib. 415); Portugal, 1667 (id. vii. i. 17); Spain, 1668 (ib. 90); Sweden, 1672 (ib. 166); England, 1677 (ib. 329); United Provinces, 1678 (ib. 359); United Provinces, 1697 (ib. ii. 389).

[3] Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7. Treaties with Sweden, Dumont, vi. ii. 381 and 448.

[4] With Spain, 1650 (Dumont, vi. i. 571); Portugal, 1661 (ib. ii. 369); France, 1661 (ib. 346); France, 1662 (ib. 415); England, 1667 (id. vii. i. 49); Sweden, 1667 (ib. 38); England, 1674 (ib. 283); Sweden, 1675 (ib. 317); France, 1678 (ib. 359); Sweden, 1679 (ib. 440); England, 1689 (ib. ii. 236); France, 1697 (ib. 389).

the United Provinces nor France was a party was concluded between England and Portugal in 1652[1], but except when prevented by express convention, England maintained the confiscation of enemy's goods, and she confirmed her practice by several treaties[2]. At least ten treaties, dealing with the commercial relations of the contracting parties, the greater number of which were made between nations which were also parties to treaties giving expression to the doctrine of Free ships, free goods, permitted by their silence the common practice to continue, and manifested the absence of a fixed policy on the part of the countries which engaged in them[3].

Practice in the eighteenth century.

At the commencement of the eighteenth century, therefore, the new principle had made little solid progress; and one of the two nations which had concluded the largest number of treaties embracing it, was in no hurry to adopt it as a voluntary rule.

France.

The French Règlement of 1704 exaggerated the harshness of former law by rendering liable to confiscation the raw or manufactured produce of hostile soil, when the property of a neutral, except when it was in course of transport direct from the enemy's country to a port of the neutral state to which its owner belonged. It was not till 1744 that neutral vessels carrying enemy's goods were freed from confiscation, and it was only in 1778 that the freedom of the goods themselves was conceded by the Règlement of that year[4]. It must be presumed that the rules

[1] Dumont, vi. ii. 84. This treaty was confirmed in 1661 and 1703, so that the rule of 'Free ships, free goods' remained in force as between England and Portugal till 1810, when it was abandoned by the Treaty of Rio Janeiro. Hansard, cxlii. 491.

[2] With Sweden, 1654 (Dumont, vi. ii. 80); Denmark, 1654 (ib. 92); Sweden, 1661 (ib. 387); Denmark, 1661 (ib. 346); Denmark, 1670 (id. vii. i. 128).

[3] England and the United Provinces, 1654 (Dumont, vi. ii. 76); England and Brandenburg, 1661 (ib. 364); England and Sweden, 1661 (ib. 384); England and Denmark, 1661 (ib. 346); Sweden and France, 1661 (ib. 381); England and the United Provinces, 1662 (ib. 423); England and Denmark, 1669 (id. vii. i. 126); England and Spain, 1670 (ib. 138); England and Sweden, 1666 (id. vi. iii. 83); France and Sweden, 1672 (id. vii. i. 169).

[4] Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7; Pistoye et Duverdy, i. 344 and 360.

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enforced by a country, apart from treaties, correspond to its views of justice or established usage. If, while maintaining these rules, it at the same time multiplies treaties in an opposite sense, the inference is not that it looks upon the law which it is content to administer as destitute of authority, but that its own interests are best served by inducing other nations to alter its provisions. France became the advocate of the principle of Free ships, free goods, but it is safer to appeal to her regulations than to her treaties as evidence of general rule, and it is not likely that those regulations would have been expunged from her international code if the maritime predominance of England had failed to consolidate itself.

Spain.

Spain imitated the policy of France, and while recognising the freedom of enemy's goods by treaty, it was not till 1780 that her private rules exempted either them or the neutral vessel from confiscation [1].

Great Britain.

England fettered herself by treaties with few states, and continued to give effect to the old practice of seizing neutral goods, while releasing the neutral vessel with payment of freight [2]. In maintaining this usage she was brought in 1780 into sharp collision with the neutral states.

First Armed Neutrality.

The First Armed Neutrality put forward the immunity of belligerent cargoes in neutral vessels as one of its doctrines; and the weakness produced by the American War prevented England from adopting any means for the vindication of her views. But the members of the league were not themselves proof against the temptation of war. In 1788 Sweden openly renounced the

[1] De Martens, Rec. iv. 270.

[2] The principal treaties concluded during the eighteenth century, down to the time of the First Armed Neutrality, in which the principle of 'Free ships, free goods' was contained, were those of Utrecht in 1713 between England, France, and the United Provinces (Dumont, viii. i. 348 and 379); between England and Spain, 1713 (ib. 409); Spain and the United Provinces, 1714 (ib. 431); the United Provinces and Russia, 1715 (ib. 470); Spain and the Empire, 1725 (ib. ii. 115); France and the United Provinces, 1739 (Wenck. Codex Juris Gentium, i. 424); France and Denmark, 1742 (ib. 621); Sweden and the Two Sicilies, 1742 (ib. ii. 143); Denmark and the Two Sicilies, 1748 (ib. 281); France and the United States, 1778 (De Martens, Rec. ii. 598).

principles of the Armed Neutrality while at war with Russia, and the latter power tacitly followed her example[1]. The treaties which were made between the establishment of the Armed Neutrality and the outbreak of the wars of the Revolution stipulate for the freedom of hostile goods[2]; but three months of hostilities had hardly passed, in 1793, when France declared enemy's goods on board neutral vessels to be good prize, the neutral ship being released, and freight being paid by the captors[3]. Russia had already denounced her treaty of 1787; and Great Britain, Russia, Spain, the Empire, and Prussia agreed that the contracting powers would unite all their efforts to prevent neutrals 'from giving, on this occasion of common concern to every civilised state, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French, on the sea, or in the ports of France[4].' The general attitude of England in the matter was clearly defined by Pitt. 'I must observe,' he said, 'that the hon. gentleman has fallen into the same error which constitutes the great fallacy in the reasoning of the advocates for the Northern powers; namely, that every exception from the general law by a particular treaty proves the law to be as it is stated in that treaty; whereas the very circumstance of making an exception by treaty proves what the general law of nations would be if no such treaty were made to modify or alter it. The hon.

Practice during the French wars, 1793–1815.

[1] Manning, 336.

[2] United States and United Provinces, 1782 (De Martens, Rec. iii. 439); Denmark and Russia, 1782 (ib. 476); England, France, and Spain, 1783 (ib. 543); United States and Sweden, 1783 (ib. 568); United States and Prussia, 1785 (id. iv. 42); France and the United Provinces, 1785 (ib. 68); Austria and Russia, 1785 (ib. 76); England and France, 1786 (ib. 168); Russia and France, 1787 (ib. 210); Russia and the Two Sicilies, 1787 (ib. 236); Russia and Portugal, 1787 (ib. 327); France and Hamburg, 1789 (ib. 426); Denmark and Genoa, 1789 (ib. 442). But the United States distinctly asserted the doctrine that 'according to the law of nations, the goods of an enemy found on board the ship of a friend are liable to capture.' Messrs. Pinckney, &c., to the French Minister of Foreign Affairs, January 27, 1798; American State Papers, ii. 181. See also Mr. Jefferson to Mr. Morris, August 16, 1793; ib. i. 123.

[3] De Martens, Rec. v. 382.

[4] Ib. 409 and 440.

gentleman alludes to the treaty made between this country and France in the year 1787, known by the name of the Commercial Treaty. In that treaty it certainly was stipulated that in the event of Great Britain being engaged in war and France being neutral, she should have the advantage now claimed, and *vice versâ;* but the hon. gentleman confesses that he recollects that the very same objection was made at that time, and was fully answered, and that it was clearly proved that no part of our stipulation in that treaty tended to a dereliction of the principles for which we are now contending[1].'

The Second Armed Neutrality reasserted for a moment the principles of 1780, but one of the articles of the treaty concluded between England and Russia in 1801, to which Denmark and Sweden afterwards acceded, provided that the property of enemies on board neutral vessels should be confiscable. In 1807 Russia annulled the convention of 1801, and proclaiming afresh the principles of the Armed Neutrality, declared that she would never depart from them[2]; but in 1809 an ukase was issued under which 'ships laden in part with the goods of the manufacture or produce of hostile countries were to be stopped, and the merchandise confiscated and sold by auction for the profit of the crown. But if the merchandise aforesaid compose more than half the cargo, not only the cargo, but the ship also shall be confiscated[3].'

Thus at the general peace, not only had the ancient practice been steadily acted upon by the most powerful maritime state; but the advocates of the intrusive principle had permitted their allegiance to it to be not infrequently shaken, under circumstances which sufficiently prove their conduct to have been simply dictated in all cases by the varying interests of the moment.

Progress of the doctrine, Free ships,

Between 1815 and 1854 France gave proof of her continued preference for the doctrine of Free ships, free goods, by concluding several treaties in which it was embodied; and the United

[1] Pitt's Speeches, iii. 227–8. [2] Ortolan, Dip. de la Mer, ii. 156. [3] De Martens, Nouv. Rec. i. 485.

States, while fully accepting the English view as expressing existing law, entered into frequent engagements in a contrary sense[1]. The new principle, therefore, acquired a certain amount of additional strength; and at the same time no opportunities occurred for upholding the older usage by practice. Until the beginning of the Crimean War, however, no change took place in the relative legal value of the two principles. The original adherents of the newer doctrine had embraced it afresh; but it had not been admitted by the powers which before rejected it. But in 1854 it was felt that it was difficult for allied states to apply different legal theories in a common war, and an agreement for identical action was come to by Great Britain and France, under which the principle of the immunity of enemy's goods in neutral ships was provisionally accepted by the former. On the conclusion of the Treaty of Paris the same principle was accepted by the parties to it in a Declaration, which was intended to form the basis of a uniform doctrine on maritime law, and to which all states not represented at the Congress were afterwards invited to accede. The only countries possessing a sea coast which, up

free goods towards general acceptance.

It is acted upon during the Crimean War.

Declaration of Paris.

[1] 'The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:—1. That a belligerent may take enemy's goods from neutral custody on the high seas; 2. That the carrying of enemy's goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. While the government of the United States has endeavoured to introduce the rule of Free ships, free goods, by conventions, her courts have always decided that it is not the rule of war; and her diplomatists and text-writers, with singular concurrence, considering the opposite diplomatic policy of the country, have agreed to that position.' Dana's Wheaton, note to § 475.

The treaties concluded by the United States are those with Sweden, 1827 (De Martens, Nouv. Rec. vii. 279); Colombia, 1824 (id. vi. 992); Central America, 1825 (ib. 832); Brazil, 1828 (id. ix. 60); Mexico, 1831 (id. x. 336); Chile, 1832 (id. xi. 442); Venezuela, 1836 (id. xiii. 556); Peru-Bolivia, 1836 (id. xv. 118); Ecuador, 1839 (Nouv. Rec. Gén. iv. 310); New Grenada, 1846 (id. xiii. 659); San Salvador, 1850 (id. xv. 73); Russia, 1854 (id. xvi. i. 572). Treaties have been concluded by France with Venezuela, 1843 (id. v. 170); Ecuador, 1843 (ib. 409); New Grenada, 1844 (id. vii. 620); Chile, 1846 (id. xvi. i. 9); Guatemala, 1848 (id. xii. 10).

Practice of the United States, and of Spain.

to the present time, have withheld their formal adherence to the Declaration are the United States, Spain, Mexico, and Venezuela. But the United States announced at the beginning of the Civil War [and in 1898] that they would give effect to the principle during the continuance of hostilities[1]. [In the latter year Spain, while reiterating that she was not bound by the Declaration of Paris, gave orders for the observation of the rules that (*a*) a neutral flag covers the enemies' goods, except contraband of war, and (*b*) neutral goods, except contraband of war, are not liable to confiscation under the enemies' flag[2].]

Although, therefore, the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which till lately enjoyed a superior authority.

[1] Dana's Wheaton, note to § 475. Hertslet, Commercial Treaties, xxi. 1073.
[2] Id. p. 837.

CHAPTER VIII

BLOCKADE

In what blockade consists.

BLOCKADE consists in the interception by a belligerent of access to territory or to a place which is in the possession of his enemy. As it is obviously a mode by which severe stress may be put upon the population subjected to it through the interruption of communication with the external world which it entails, it is an invariable concomitant of all warlike operations by which control is gained over avenues through which such communication takes place. The conditions however under which communication is interrupted by land and by sea are different, and they are such that for the purposes of international law blockade consists only in the interception of access by sea. On land it is enforced partly as a consequence of the possession by a belligerent of the rights of control which have been already mentioned, and partly through the material power of which he can avail himself at every moment within the range of his military occupation. Blockade on land therefore calls for no special rules for its maintenance; sovereignty in some cases and military occupation in others supply the requisite rights of control, and the material conditions of its exercise are simple. But at sea the rights of the neutral being equal to those of the belligerent except in so far as they are subordinated to the special needs of the latter, the neutral has *primâ facie* a right of access to the enemy; and when this right is ousted by the assertion of the special needs of the belligerent, it must be shown that the latter is in a position to render the assertion effective, the right which is set up by his needs being a bare one, like all other belligerent rights, and the conditions of maritime warfare being such that control over a space of water in which a naval force is stationed cannot be supposed to be effective as of

course. Maritime blockade therefore calls for special rules defining the conditions under which it can be set up and those under which it continues to exist.

It is agreed that for a maritime blockade to be duly set up and maintained—

Conditions of its due institution and maintenance.

1. The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have in some way been brought to the knowledge of the neutrals affected.
2. It must have been initiated under sufficient authority.
3. It must be maintained by a sufficient and properly disposed force.

It is endeavoured to give effect to these general rules by means of practices which enjoy very different degrees of authority.

How a neutral becomes affected with knowledge of a blockade.

As a blockade is not a necessary consequence of a state of war, but has to be specially instituted, it would evidently be impossible to assume that a neutral possesses any knowledge of its existence until the fact of its establishment has been in some manner notified or brought home to him. So far not only is the general rule as a matter of fact agreed upon, but it could not stand otherwise. But opinions differ widely as to whether it is sufficient in order to justify the belligerent in seizing the property of the neutral that the knowledge of the latter shall be proved, or whether a formal notification must be served upon him.

English and American theory.

According to the view which finds its expression in English and North American practice, and has been adopted also by Prussia and Denmark[1], the source of liability to seizure is knowledge of the fact that a blockade has been established, together with the presumption that an existing blockade will under ordinary circumstances continue. A neutral therefore who sails for a port with full knowledge that it is blockaded at the moment

[1] See an analysis of the Prussian Prize Regulations [which are now presumably in force throughout the German Empire] in Bulmerincq (Le Droit des Prises Maritimes, Rev. de Droit Int. x. 240), and of the Danish Regulations (ib. 212).

when his voyage is commenced, ought to expect that it will be in the same state when he arrives; and anything which can be proved to affect him with knowledge at the former time will render him liable to the penalties imposed for violation of blockade.

French theory.

On the other hand, according to the view which is identified with French practice, and which is also followed by Italy, Spain, and Sweden [1], the neutral is not expected to shape his course on any presumption with respect to the continuance or cessation of a blockade; and he is not injuriously affected by knowledge acquired at any time before he can experimentally test its existence as good on the spot which is subjected to it.

French practice.

Hence, although it has lately become customary for the French government at the commencement of a blockade to notify the fact of its existence to foreign governments as a matter of courtesy, their subjects are not considered to be affected by notice through them. Each neutral trader approaching the forbidden coast is individually warned by one of the blockading squadron, a vessel not engaged in the blockade being incompetent to affect the trader with notice, the fact of warning is endorsed on the ship's papers, with mention of the date and place of notification, and it is only for subsequent attempts to enter that the neutral is liable to seizure. The practice was consistently followed by France in blockading the Mexican ports in 1838, and those of the Argentine Republic in the same year; it has been equally respected during her recent European wars; and stipulations in accordance with it are found in many modern treaties concluded by her, as well as in a certain number of conventions between other states. It is also adopted by several modern continental writers; who argue that to sail for a blockaded place in the hope of finding the entry freed by the chances of war, by the effects of weather, or by some other cause, is in itself an innocent act, and therefore not to be punished because the hope fails to be

[1] For the Italian and Swedish rules see Bulmerincq (Rev. de Droit Int. x. 220 and 441); for the Spanish practice, Negrin, 213.

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justified by the circumstances existing at the moment of arrival[1].

English and American practice.

The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sails with the destination of a blockaded port from a place at which the fact of blockade is so notorious that ignorance of its existence is impossible, confiscation may take place upon seizure without previous warning[2]. But in practice notification of some sort is

[1] Ortolan, ii. 335-41. Calvo (§ 2581) considers that the French practice ought to be the accepted rule of law; Pistoye and Duverdy (i. 370) and Hautefeuille (tit. ix. chap. ii. sect. ii) hold that the special notification is necessary, and that a diplomatic notification ought also to be given.

For the French Regulations of 1870 see Bulmerincq in Rev. de Droit Int. x. 400.

The treaties in which France has inserted stipulations in conformity with her practice are those with Brazil, 1828 (De Martens, Nouv. Rec. viii. 60); with Venezuela, 1843 (Nouv. Rec. Gén. v. 172); with Ecuador, 1843 (ib. 411); with New Grenada, 1844 (id. vii. 621); with Guatemala, 1848 (id. xii. 11); with Chile, 1846 (id. xvi. i. 10); with Honduras, 1856 (ib. ii. 154); with Nicaragua, 1849 (ib. 191).

The treaties in which countries other than France have bound themselves by like provisions are those between the United States and Sweden in 1816 (De Martens, Nouv. Rec. iv. 258); the Hanseatic Towns and Mexico, 1828 (id. Nouv. Supp. i. 687); the United States and Sardinia, 1838 (id. xvi. 266); Austria and Mexico, 1842 (Nouv. Rec. Gén. iii. 448); the Argentine Republic and Peru (id. 2e Sér. xii. 448); Italy and Uruguay (id. xii. 664). The practice seems to have arisen out of the doctrine of the Second Armed Neutrality, in the treaties concluded between the members of which the principle was first laid down. De Martens, Rec. vii. 172, &c.

[2] The Columbia, i Rob. 156; The Adelaide Rose, ii Rob. 111, note; The Union, Spinks, 164. 'If a blockade *de facto* be good in law without notification, and a wilful violation of a legal blockade be punishable with confiscation, propositions which are free from doubt, the mode in which knowledge has been acquired by the offender, if it be clearly proved, cannot be of importance.' The Franciska, on appeal, x Moore, 46. But capture on the ground of notoriety would be looked upon with disfavour. Dr. Lushington, in adjudicating in the first instance in the case of the Franciska, said, 'Unless the notoriety of the blockade be so great, that according to the ordinary course of human affairs the knowledge thereof must have reached all engaging in the trade between the ports so blockaded, a warning to each vessel approaching is indispensably requisite.' Spinks, 135.

always given. If the blockade is instituted under the direct authority of the government, the fact of its commencement is always notified to foreign states. The information thus communicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them. If therefore a vessel sails to a blockaded port at a time clearly later than that at which the general notification is matter of public knowledge, no special notification is required before seizure[1]. But the case is different when vessels sail before such time, or approach a port closed by a merely *de facto* blockade, which has been instituted on the authority of the officer commanding the belligerent force in the neighbouring seas, or which for some reason has not yet been the subject of a diplomatic notification. Knowledge of the fact cannot then be presumed, and vessels are consequently turned back with a like notice endorsed on their papers to that which is required under the French usage[2]. And a mitigation of the strict rule is introduced when a vessel sails with full knowledge of the existence of a blockade from a port at a great distance from the closed harbours. The presumption in favour of continuance of the blockade is of necessity weakened with a lapse of time sufficient for the completion of a long voyage; and it was held during the wars at the beginning of the nineteenth century that a vessel coming from America into European waters was not rendered liable to capture by mere destination to a blockaded port. Enquiry as to the continued existence or suspension of the blockade was under these conditions justifiable; but it was held that such enquiry ought to be made, not at the blockaded port, but at intermediate places, where fraud was less likely to be masked under enquiry than at the mouth of the blockaded harbour[3].

[1] The Columbia, loc. cit.; The Neptunus, ii Rob. 114; The Vrow Johanna, ii Rob. 109; Mr. Justice Story in The Nereide, ix Cranch, 440.

[2] Vrow Judith, i Rob. 151; The Neptunus, loc. cit.; Admiralty Manual of Prize Law (Holland), 1888, p. 34. A vessel may sail with the intention of enquiring whether a blockade *de facto* is continued or not, Naylor *v.* Taylor, iv Manning and Ryland, 531.

[3] The Betsey, i Rob. 334. The United States have stipulated for the

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The English practice to be preferred.

The practice of England and the United States is unquestionably better suited than that of France to the present conditions of navigation[1]. The electric telegraph and newspapers spread authentic news rapidly and universally; steam has reduced the length of voyages and rendered their duration certain; it can

mitigated practice of allowing a vessel to sail for a distant port notwithstanding the existence of blockade in treaties concluded in 1806 with England (De Martens, Rec. viii. 585); in 1816 with Sweden (id. Nouv. Rec. iv. 258); in 1828 with Brazil (id. ix. 62); in 1836 with Venezuela (id. xiii. 560); in the same year with Bolivia (id. xv. 113); in 1839 with Ecuador (Nouv. Rec. Gén. iv. 316); and in 1871 with Italy (Archives de Droit Int. 1874, p. 134). M. Calvo has misapprehended the effect of these treaties in adducing them as examples of the adoption of the French practice with respect to notification. He has shown an equal misapprehension of the English practice in treating as a middle term between it and that of France the Danish Regulations of 1864, providing that special notification is to be given to a vessel which, from the shortness of time which has elapsed since the issue of a general notification, has not had an opportunity of becoming acquainted with the existence of a blockade (§§ 2589–90). M. Ortolan appears also to have fallen into error with respect to the practice of the United States, in saying, after stating the French practice, that 'c'est ainsi également, qu'agissent les États Unis d'Amérique.' Mr. Lincoln's Proclamation of April 19, 1861, no doubt stated that vessels would be individually warned; but Commodore Prendergast, in notifying the actual commencement of the blockade of the Virginian coast in July of the same year, said only that 'those coming from abroad, and ignorant of the blockade, will be warned off;' and the principle that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel to capture, without special notice, was re-asserted with much emphasis by Chief Justice Chase in the case of The Circassian, ii Wallace, 151. It has always been a principle in American practice, and was affirmed by Mr. Justice Story in the case of The Nereide, ix Cranch, 440. In the case of The Hiawatha (ii Black, 675), which issued from a blockaded port during the civil war, it was contended that, under the Proclamation of April 19, a warning was necessary, but it was decided that it would be absurd to require a warning when the master of a vessel had actual previous knowledge. [And see the Adula, 176 United States Reports, p. 362. President McKinley by proclamation dated April 22, 1898, ordered that all neutrals' vessels approaching or attempting to leave a blockaded port 'without notice or knowledge' of the blockade should be duly warned by the commander of the blockading force, id. p. 391.] See also postea, pp. 709, 710.

[1] MM. Bluntschli (§ 832) and Heffter (§ 156) partially adopt the English practice in admitting that special notification to the neutral trader is unnecessary; but they hold that capture can only be effected during an actual attempt at violation on the blockaded spot itself. The same view is expressed in the proposed Règlement des Prises Maritimes of the Inst. de Droit Int. §§ 35–44. Annuaire de l'Institut, 1883, p. 218.

only be under rare circumstances, against the effect of which mitigations such as those introduced into English usage may easily provide, that a vessel will arrive innocently before a blockaded port. If capture for attempt to break a blockade is to be permissible at all, it must be morally permissible to capture under ordinary circumstances without individual notice, provided diplomatic, or other sufficient general, notice has been given; and if such capture is morally permissible, it is certainly to the advantage of neutral states to allow it to take place. Belligerents will not quietly suffer the results of commerce prejudicial to their warlike operations; and unless they are entrusted with weapons of sufficient strength to enable them to deal with it effectively, they will try, with more or less success, to throw responsibility upon the neutral states, to the confusion of legal distinctions which it is highly convenient to the latter to maintain, and to the vastly increased danger of national conflicts [1].

Authority under which a blockade may be established.

A blockade is considered to be an act of war which affects, of right, not only the subjects of a neutral state, but also persons and things partaking of the national character. Strictly, access to a blockaded place is forbidden to ships of war as well as merchant vessels. The establishment of a blockade is therefore so high an exercise of sovereign power that it can only be effected under the express or implied orders of the government of a country; and the general instructions given to the commander of a belligerent force do not necessarily imply competent orders. If however he is operating at a considerable distance from home, he is supposed to be invested with such portion of

[1] During the American Civil War Chief Justice Chase, in speaking of the rule under which sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects a vessel to capture, declared that 'we are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now when steam and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised into a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights.' The Circassian, ii Wallace, 151.

the sovereign authority as may be required for the exigencies of the service; and it has even been held that when an officer not possessed of adequate powers had taken on himself to commence a blockade, captures effected under it might be made retrospectively valid by a subsequent adoption of his act by the state. The principle therefore in practice goes little further than to forbid subordinate officers from creating or varying a blockade at their will[1].

Maintenance by a sufficient and properly disposed force.

The doctrine with regard to the proper maintenance of a blockade, which has been laid down by the English and American courts, which is approved of by English and American writers, and which is embodied in the policy of both countries, requires that a place shall be 'watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable[2].'

Practice of England and the United States.

Provided access is in fact interdicted, the distance at which the blockading force may be stationed from the closed port is immaterial. Thus Buenos Ayres has been considered to be effectually blockaded by vessels stationed in the neighbourhood of Monte Video; and during the Russian war in 1854 the blockade of Riga was maintained at a distance of one hundred and twenty miles from the town by a ship in the Lyser Ort, a channel three miles wide, which forms the only navigable entrance to the gulf[3].

It is impossible to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade.

[1] Phillimore, iii. § cclxxxviii; Calvo, § 2555; Bluntschli, § 831; The Rolla, vi Rob. 365; The Hendrick and Maria, i Rob. 148; The Franciska, x Moore, 46. [The Adula, 176 United States Reports, p. 361.]

[2] The Franciska, Spinks, 115; Phillimore, iii. §§ ccxciii–iv; Bernard, 245; Kent, Lect. vii; Wheaton, pt. iv. chap. iii. § 28; Mr. Mason's instructions to the naval forces of the United States, 1846, quoted by Ortolan, ii. 343. Among continental publicists M. Bluntschli accepts and repeats the English doctrine, § 829.

[3] The Franciska, loc. cit.

It is for the Prize Courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition. In some cases, where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus during the American Civil War, the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signalling distance. This amount and disposition of force seem to have been thought by the British government amply sufficient to create the degree of risk necessary under the English view of international law, although from the peculiar nature of the coast a large number of vessels succeeded in getting out and in during the whole continuance of the blockade[1].

This abstention from any pedantic interpretation of general rules extends to cases where, the force being adequate and the fact of blockade known, a ship enters owing to a momentary absence of a blockading vessel, not only when, as already mentioned, the absence is owing to weather, but even when it is caused by the chase of a prize. The blockade is not in these cases raised, and an endeavour to take advantage of such absence is looked upon as an attempted breach. On the other hand, the blockade ceases if an enemy's force succeeds, for however short a time, in driving off the squadron which is charged with maintaining it[2], or if vessels are diverted to other employment; and if a prize is pursued so far from the blockading station that a neutral ship on arriving near the entrance may fairly think

When a blockade ceases.

[1] Bernard, Neut. of Great Britain, chaps. x and xii.

[2] The Frederic Molke, i Rob. 87; The Columbia, i Rob. 156; The Hoffnung, vi Rob. 115; Vos and Graves v. The Un. Ins. Cy., ii Johnson (American), 187; Radcliff v. Un. Ins. Cy., vii Johnson, 53.

that the blockade is abandoned, it may be held to be at least so far impaired that the neutral so attempting to enter is relieved from the natural penalty of his act [1].

Opinions of continental writers.

The opinions held by the majority of modern continental writers as to the conditions under which a blockade is efficiently maintained, differ in several important respects from the principles which guide the practice of England and the United States. They may perhaps be summarised as follows. The immediate entrance to a port must be guarded by stationary vessels, in such number as either to render entrance impossible, or at least to expose any ships running in to a cross fire from the guns of two of them. Any accidental circumstance which makes it temporarily possible to go in puts an end to the blockade, and justifies a vessel in attempting to enter [2]. As, for three quarters

[1] Bernard, 239. See, on diversion, the note of Lord Lyons to Mr. Seward, May 22, 1861. The Niagara, blockading Charleston, had been sent away to intercept a cargo of arms expected at another part of the coast, and the harbour remained open for at least five days. Lord Lyons took for granted that an interruption had occurred, but the government of the United States, in view of the effect understood by it to flow from a general notification, refused to admit that any cessation had taken place.

It was formerly held in the United States, and would, it may be presumed, be still held in England, that 'although acquisitions made during war are not considered permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror so long as he retains the possession and government of them' (Thirty Hogsheads of Sugar *v.* Boyle, ix Cranch, 195), and consequently that a blockade is raised by the capture and occupation of the blockaded place by the attacking force. But during the American Civil War, a majority of judges in the Supreme Court asserted the doctrine, to which reference has been already made (antea, p. 508), that 'The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city being itself hostile, the opposing enemy in the neighbourhood, and the occupation limited, recent, and subject to the vicissitudes of war;' Chief Justice Chase in The Circassian, ii Wallace, 135. Compensation for wrongful capture was subsequently awarded in this case by the Mixed Commission on British and American Claims (Parl. Papers, North Am. No. 2, 1874, p. 124).

[2] The opinions of the various writers are essentially identical, but differ from one another on some points. Heffter (§ 155) requires that vessels shall be 'stationnés en permanence et en assez grand nombre pour empêcher toute espèce de communication avec la place ou le port investi;' but he does not hold that temporary absence entails cessation of the blockade. Ortolan

of a century, by far the most extensive experience in blockades has fallen to the share of England and the United States, these opinions, whatever their abstract merits, labour under the disadvantage of being inconsistent with the most authoritative usage upon the subject. They are also much more rigid than the principles embodied in the Declaration of Paris, and accepted by the great majority of civilised nations. It is hardly necessary therefore to inquire upon what ground they are stated to represent existing law [1]. The signatary powers of the Declaration

(ii. 328) thinks that blockade of a harbour is not effective unless 'toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes, que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné;' and considers (344) that if weather has caused the temporary absence of the blockading squadron, although the blockade is not raised, it is open to a vessel to attempt to enter, and if taken, to allege ignorance of the fact of blockade. Calvo (§ 2567) declares that the belligerent must have a sufficient force, so disposed as to become 'le maître de la mer territoriale qu'il occupe, et à pouvoir en interdire l'accès à tout navire étranger;' apparently he requires that the ships shall be anchored. Hautefeuille (tit. ix. chap. ii. sect. i. § 1) says that 'le blocus n'existe qu'autant que le belligérant qui attaque un port place devant ce port un nombre de bâtiments de guerre suffisant pour en commander les abords par leur artillerie;' and holds (sect. iii. § 2) that interruption from any cause terminates the blockade. To Gessner (179) 'la définition de la première neutralité paraît exemplaire;' a blockaded port is therefore one where there is, 'par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.' He exhausts the language of invective in assailing the existing doctrine and policy of England, and is fully satisfied with the American practice during the Civil War. It is not for me to attempt his extrication from the complicated inconsistencies in which he has thus involved himself. Pistoye and Duverdy (i. 365) confine themselves to cautious and accurate language. 'Il faut,' they say, 'que la place soit investie par des forces suffisantes pour en rendre l'entrée périlleuse aux navires qui voudraient s'y introduire.'

The proposed 'Règlement des Prises Maritimes,' adopted by the Institut de Droit International, provides that a blockade is to be considered effective 'lorsqu'il existe un danger imminent pour l'entrée ou la sortie du port bloqué, à cause d'un nombre suffisant de navires de guerre stationnés ou ne s'écartant que momentanément de leur station.' It adds that 'si les navires bloquants s'éloignent de leur station pour un motif autre que le mauvais temps constaté, le blocus est considéré comme levé.' Ann. de l'Institut, 1883, p. 218. The effect of the suggested rules would approach very nearly to the English practice.

[1] A few treaties contain stipulations in agreement with the views of the foreign writers whom I have quoted. I am not aware that any blockade has

of Paris, which is perfectly in harmony with English doctrine, were satisfied with declaring that 'blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy[1].'

It may be remarked, apart from reference to existing law, and apart also from all question whether blockades ought to be permitted at every place where they are now lawful, that the experience of the civil war in America has proved the use of steam to assist so powerfully in their evasion, as to render it unwise to shackle the belligerent with too severe restrictions. If it is wished altogether to deprive blockades of efficacy, it would be franker and better to propose to sweep them away altogether.

ever been conducted under their provisions. In 1742 France and Denmark agreed that a blockaded port should be closed by two vessels at least, or by a battery of guns on land, and the same stipulation was made between Denmark and Genoa in 1789. The treaty between Holland and the Two Sicilies in 1753 prescribes that at least six ships of war shall be ranged at a distance slightly greater than gun-shot from the entrance, or else that the blockade may be maintained by shore batteries and other works. The First Armed Neutrality, in 1780, laid down that blockade must be effected with vessels stationary and sufficiently near to produce evident danger in entering. The Second Armed Neutrality put forward the same doctrine; but Russia, in her treaty with England in 1801, consented to substitute the words 'arrêtés ou suffisamment proches,' for 'arrêtés et suffisamment proches;' and the only treaty since concluded in which stringent stipulations are made is that between Denmark and Prussia in 1818, by which it was required that two vessels should be stationed before every blockaded port. Hautefeuille, tit. ix. chap. ii. sect. i. § 1; Gessner, 159; De Martens, Rec. vii. 263.

[1] With reference to the meaning of the Declaration of Paris, Lord Russell, in 1863, wrote as follows: 'The Declaration of Paris was in truth directed against what were once termed "paper blockades;" that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James' (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration.' Lord Russell to Mr. Mason, Feb. 10, 1863, ap. Bernard, 293.

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Effect of cessation of blockade.

According to the English theory, as fully as by that adopted in France, the limitations imposed on neutral commerce by the right of blockade depend for their validity solely upon the fact that a blockade really exists at any given moment. A belligerent therefore has no power to subject a neutral to penalties from the time that a port ceases to be effectively watched, and the government of the United States was undoubtedly wrong in holding the opinion put forward by it in 1861, that a blockade established by notification continues in effect until notice of its relinquishment is given by proclamation[1]. It is no doubt the duty of a belligerent state which has formally notified the commencement of a blockade to give equal and immediate publicity to its discontinuance, but a vessel bound for or approaching a port at a time between the actual cessation of blockade and the public notification of the fact is not liable to confiscation. If a ship is captured under such circumstances, the utmost, but also the legitimate, effect of a notification is that the neutral, who has probably started with the intention of violating the blockade, and whose adventure has since become innocent from events with which he has had nothing to do, is bound to prove the existence of a state of facts which frees his property from the penalty to which it is *primâ facie* exposed. The presumption of the court will be that a regularly notified blockade continues to exist until that presumption is displaced by evidence[2]. In the case of a *de facto* blockade the burden of proof lies always upon the captor.

[1] Mr. Seward to Lord Lyons, May 27, 1861; ap. Bernard, 238.

[2] Bernard, 239. See also on the subject Phillimore, iii. ccxc, and The Neptunus, i Rob. 171; The Circassian, ii Wallace, 150; The Baigorry, ib. 480. The tenour of the instructions issued to naval officers by the French government in 1870 is given as follows by M. Bulmerincq (Rev. de Droit Int. x. 400):—'Si les forces navales françaises étaient obligées, par une circonstance quelconque, de s'éloigner du point bloqué, les navires neutres recouvreraient le droit de se rendre sur ce point. Dans ce cas aucun croiseur français ne serait fondé à les entraver, sous prétexte de l'existence antérieure du blocus, s'il y a d'ailleurs la connaissance certaine de la cessation ou de l'interruption de ce blocus. Tout blocus levé ou interrompu doit être rétabli et notifié de nouveau dans les formes prescrites.'

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Conditions under which vessels lying in a port when it is placed under blockade can come out.

Neutral vessels lying in a belligerent port at the moment when it is placed under blockade are subjected to special usages with respect to which there is no difference of opinion. It would be obviously unjust to shut up the unoffending neutral in a common prison with the belligerent; on the other hand, the object of a blockade being to cut off all trade from the closed port, the operation would be to a great extent nullified if vessels within the harbour at the inception of the blockade were allowed to come out with cargo shipped after its commencement[1]. Hence, exit is allowed only under certain conditions, and it is necessary, if a vessel is to appear at the mouth of the port in a state according with these conditions, that she shall be informed beforehand of the fact that they have been imposed. A general notification is therefore sent to the authorities of the blockaded port, announcing the commencement of the blockade and specifying a time during which vessels may come out. It being certain that a notice affecting the narrow space of a particular port must of necessity become known to every person within it, the practice of most nations dispenses with further warning; and after a blockade has existed for a while, 'it is impossible for those within to be ignorant of the forcible suspension of their commerce,' so that, even without notice, warning to each ship is superfluous[2]. But the French perhaps extend the privilege of special warning to vessels issuing from a blockaded port with cargo laden after establishment of the blockade[3].

[1] It would seem however that Prussia and Denmark allow ships to come out with cargo shipped after the commencement of the blockade. Rev. de Droit Int. x. 212, 239.

[2] The Vrow Judith, i Rob. 152. In 1855 it was laid down that '*primâ facie* every vessel whatsoever, laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule.' The Otto and Olaf, Spinks, 259.

[3] The Eliza Cornish, Pistoye et Duverdy, i. 387. The Instructions of 1870 however seem to be silent upon the point, and by expressly mentioning individual notification to ingoing vessels while keeping silence as to outcoming vessels suggest that individual notification would not now be given

The period which is allowed for the exit of ships is usually fixed at fifteen days[1], and during this time vessels may issue freely in ballast or with a cargo *boná fide* bought and shipped before the commencement of the blockade[2]. Probably fifteen days should be looked upon as a minimum period, many ports being so situated as to render exit from them within any given time more difficult than from those which have usually been the subject of the fifteen days' rule. In 1838, on establishing the blockade of Buenos Ayres, France allowed neutral ships to come out for forty-two days[3]. It does not appear what circumstances then demanded so exceptional an indulgence; but as sea-going vessels now ascend to Rosario, it is clear that if the Argentine ports were blockaded at the present day, a considerable time might elapse before the existence of a blockade was known to all neutral vessels, and that they might have great difficulty in reaching the mouth of the river within any short period. Even where a port on a navigable river is much nearer to its mouth than in the supposed case, special circumstances might often require an extension of time. When New Orleans was blockaded in 1861 the water on the bar of the Mississippi was unusually

in the latter case. Negrin believes the latter to be the French practice; p. 213.

A few exceptional treaties provide for special warning to vessels issuing with cargo laden after the beginning of the blockade. These have been concluded between the Hanseatic Towns and Mexico, 1828 (De Martens, Nouv. Supp. i. 684); the United States and Brazil, 1828 (Nouv. Rec. ix. 62); United States and Mexico, 1831 (id. x. 340); United States and Venezuela, 1836 (id. xiii. 560); United States and Bolivia, 1836 (id. xv. 120); France and Ecuador, 1843 (Nouv. Rec. Gén. v. 410); United States and Italy, 1871 (Archives de Droit Int. 1874, p. 134).

[1] This time was given in 1848 and 1864 by Denmark; by England and France during the Crimean War; by the United States during the Civil War; and by France in the war of 1870.

[2] The Vrow Judith, i Rob. 152; The Franciska, Spinks, 122; Heffter, § 157; Bluntschli, § 837. But a vessel must not enter in ballast to bring away a cargo bought before the commencement of a blockade. The Comet, Edwards, 32. A cargo which has been *boná fide* placed on board may be partially transferred to lighters for purposes of navigation, and may be re-shipped outside. The Otto and Olaf, Spinks, 257.

[3] De Martens, Nouv. Rec. xv. 503.

low, and the commander of the blockading squadron extended the permitted time in favour of vessels of deep draught[1].

What acts constitute a breach of blockade.

The acts which constitute a violation of blockade necessarily vary with the theory which is held by the belligerent maintaining the blockade as to the conditions of its legality; and their nature has been already to a great extent indicated in discussing the effect of notification.

Of the French practice it is sufficient to say that, as it does not admit a presumption in favour of the continuance of a blockade, a distinct attempt to cross the actual barrier by force or fraud is, as a general rule, necessary to justify condemnation. Occasionally however an inference as to intention seems to be allowed, as in the case of a vessel captured before actually endeavouring to enter a blockaded port, but while making for it after having received in the course of her voyage a regular notification from a belligerent cruiser[2].

The English and American courts, on the other hand, in arguing from a presumption of continuance to the intention of the neutral trader, subject his property as a general rule[3] to confiscation on seizure at any time after sailing with a clear destination to a blockaded port. Where there is a doubt as to intention they submit to investigation all acts done from the commencement of the voyage. If it appears from these that, though anxious to go to the blockaded port, and sailing with that destination, the trader had no intention of braving the belligerent prohibition, his property will not be condemned. Thus a vessel has been held innocent which sailed from America for Hamburg with an intermediate destination to an English or neutral port

[1] Consul Mure to Lord John Russell, June 6, 1861, ap. Bernard, 242. [The United States in 1898 granted a period of thirty days to neutral ships with cargo. Proclamation of June 27. Hertslet, Com. Treat., xxi. p. 1079.]

[2] Calvo, § 2635. Ortolan (Dip. de la Mer, ii. 349 and 353) approves of the practice of the English courts with respect to vessels approaching a blockaded port on the pretext of enquiring whether the blockade still subsists. La Carolina, Pistoye et Duverdy, i. 381. The proposed Règlement des Prises Maritimes of the Inst. de Droit Int. adopts the French practice.

[3] For qualifications of the general rule, see antea, p. 694.

for enquiry; and in another case, although the ship's papers did not show in distinct terms at what place enquiry was to be made, she was released on fair grounds being afforded for the inference that an intention to enquire really existed[1]. But acts of doubtful character will, in the absence of full explanation, be interpreted against the trader. Thus vessels running for a port, known by them to be blockaded, under pretext of taking a pilot on board, because of falsely alleged unseaworthiness, have been held liable to seizure; and the enquiries which it is eminently proper to make at a place sufficiently distant from the blockaded harbour must not be effected at its very mouth[2]. It is not absolutely necessary, in order that a breach may be committed, that the vessel shall herself cross the line of blockade; thus if a vessel lying outside receives her cargo from lighters or vessels which have issued from a blockaded port, she becomes liable to capture[3].

During the American Civil War the courts of the United States strained and denaturalised the principles of English blockade law to cover doctrines of unfortunate violence. A vessel sailing from Bordeaux to Havana, with an ulterior destination to New Orleans, or in case that port was inaccessible, to such other place as might be indicated at Havana, was condemned on the inference that her owner intended the ship to violate the blockade if possible, notwithstanding that the design might have been

[1] The Despatch, i Acton, 163.

[2] 'The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say; "If you do not meet with the blockading force, enter. If you do, ask a warning and proceed elsewhere." Who does not perceive the frauds to which such a rule would be introductory?' The Irene, v Rob. 80. In The Cheshire, iii Wallace, 235, Mr. Justice Field says: 'If approach for enquiry were permissible, it will be readily seen that the greatest facilities would be afforded to elude the blockade;' and see The Hurtige Hane, ii Rob. 127; The Charlotte Christine, vi Rob. 101; The James Cook, Edwards, 264.

[3] Maria, vi Rob. 201; Charlotte Sophia, ib. 202 n. Of course a vessel taking on board cargo, at a port not under blockade, which has arrived from a blockaded port by canal or lagoon navigation, does not commit an infraction of the blockade; and conversely a vessel so delivering cargo is not liable to capture.

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abandoned on the information received at the neutral port [1]; and goods sent from one neutral port to another within the same dominions with an intent, formed either at the time of shipment or afterwards, of forwarding them to a place under blockade were condemned, and carried with them to a common fate the vessel in which they were embarked, notwithstanding that their transhipment was intended, unless there was reason to believe that the owners of the vessel 'were ignorant of the ulterior destination of the cargo, and did not hire their ships with a view to it [2].'

A vessel which has succeeded in effecting a breach of blockade is not exonerated by her success from the consequences of her illegal act. If a ship that has broken a blockade is taken in any part of the same voyage, she is taken *in delicto;* the offence is not terminated until she reaches the end of the voyage, and the voyage is understood to include her return [3]; on this point, the breach having been in fact committed, the French doctrine can be, and perhaps is, in unison with that of England [4]. If the blockade is raised during the voyage, the liability to capture comes to an end, the existence of the offence being dependent on the continuance of the state of things which gave rise to it [5].

Penalty of breach or attempted breach.

As a general rule the penalty for a breach of blockade is the confiscation of both ship and cargo; but if their owners are different, the vessel may be condemned irrespectively of the latter, which is not confiscated when the person to whom it belongs is ignorant at the time of shipment that the port of destination

[1] The Circassian, ii Wallace, 135.

[2] The Bermuda, iii Wallace, 574. Comp. antea, pp. 668 et seq. It is sufficiently curious that any continental publicists should claim the United States as adhering to the French practice, in face of the extreme doctrine enforced in these and like cases.

[3] Wheaton, Elem. pt. iv. chap. iii. § 28. The right of capture on the return voyage was maintained by the United States courts during the civil war. Dana's Wheaton, note to § 523.

[4] Ortolan (Dip. de la Mer, ii. 354), Hautefeuille (tit. xiii. chap. i. sect. i. § 3), and Bluntschli (§ 836) refuse even in this case to admit the right to seize elsewhere than within the blockaded spot.

[5] The Lisette, vi Rob. 378; Ortolan, ib. 356.

is blockaded, or if the master of the vessel deviates to a blockaded harbour. If however such deviation takes place to a port the blockade of which was known before the ship sailed, the act is supposed to be in the service of the cargo, and the complicity of its owner is assumed[1].

Cases of innocent entrance of blockaded ports.

There are a few cases in which neutral property can be brought into or out of a blockaded port or town without the commission of a legal breach.

When a maritime blockade does not form part of a combined operation by sea and land, internal means of transport by canals, which enable a ship to gain the open sea at a point which is not blockaded, may be legitimately used. The blockade is limited in its effect by its own physical imperfection. Thus, during a blockade of Holland, a vessel and cargo sent to Embden, which was in neutral territory, and issuing from that port, were not condemned[2].

Again, if a vessel is driven into a blockaded port by such an amount of distress from weather or want of provisions or water as to render entrance an unavoidable necessity, she may issue again, provided her cargo remains intact[3]. And a ship which has been allowed by a blockading force to enter within its sight, is justified in assuming a like permission to come out; but the privilege is not extended to cargo taken on board in the blockaded port[4].

The right possessed by a belligerent of excluding neutral ships of war from a blockaded place is usually waived in practice as a matter of international courtesy; and for a like reason the minister of a neutral state resident in the country of the blockaded ports is permitted to despatch from it a vessel exclusively

[1] The Adonis, v Rob. 258; The Mariana Flora, vii Wheaton, 57; The Alexander, iv Rob. 93; The Panaghia Rhomba, Moore's P. C. Reps. xii. 180.

[2] The Stert, iv Rob. 65.

[3] The Charlotta, Edwards, 252; The Hurtige Hane, ii Rob. 127. The general principle is stated by Bluntschli, § 838.

[4] The Juffrow Maria Schrœder, iii Rob. 160.

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employed in carrying home distressed seamen of his own nation [1].

Blockade of river partly in neutral territory.

The right of a belligerent to blockade the territory of his enemy is sometimes complicated by the territorial rights of conterminous governments. If one bank of a river is within a neutral state, or if the upper portion of its navigable course is beyond the frontier of the hostile country, a belligerent can only maintain a blockade so far as is consistent with the right of the neutral to preserve free access to his own ports or territory, and with the right of other neutrals to communicate freely with him [2]. Thus a blockade of Holland was held not to be broken by a destination to Antwerp [3]. And during the American Civil War, the Courts of the United States conceded that trade to Matamoras, on the Mexican shore of the Rio Grande, was perfectly lawful; but the Supreme Court laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan territory; and in the case of vessels captured for being north of that line, refused, while restoring them, to allow their costs and expenses [4]. It is to be hoped that a rule so little consistent with the right of neutrals to uninterrupted commerce with each other will not be drawn into a precedent.

[1] Ortolan, Dip. de la Mer, ii. 329; Phillimore, iii. § cccxiii.

[2] Ortolan, ib. 332; Calvo, § 2601. [3] The Frau Ilsabe, iv Rob. § 6.

[4] The Peterhoff, v Wallace, 54; The Dashing Wave, ib. 170; The Volant, ib. 178; The Science, ib. 179. [In the case of the Peterhoff, the refusal to allow costs and expenses seems to have been based on the conduct of that ship's captain in throwing a suspicious package overboard at the moment of capture and on his conduct generally.]

CHAPTER IX

NEUTRAL GOODS IN ENEMY'S SHIPS

PART IV CHAP. IX Conflicting theories on the subject.

The question whether it is open to a neutral to avail himself of belligerent vessels for the maritime transport of goods in themselves innocent, has been, like the question of the effect of neutral transport upon belligerent merchandise, the subject of lively debate, and like it also it has now been reduced into insignificance by the Declaration of Paris.

Two doctrines are held on the subject. According to one, the neutral property retains its freedom notwithstanding its association with that of an enemy; according to the other, contact with confiscable property taints it so irredeemably as to subject it to the fate of the latter. The theoretic ground upon which the former doctrine rests is that neutral goods are *primâ facie* free; they can be captured only because of some assistance which a belligerent immediately or remotely derives from them in the conduct of his war; goods in themselves incapable of rendering him such assistance cannot change their nature because they are carried by him; and neutrals cannot therefore be expected to refrain from conveying their property to market by means which happen to be convenient to them. The second doctrine is really the offspring of a pretension to forbid all intercourse between neutrals and an enemy; but by attaching itself to a principle, which though arbitrary is not inequitable, and which serves the interests of neutrals, it has blinded the world to its true nature; and as part of the formula, 'Free ships, free goods; enemy ships, enemy goods,' it has been adopted into the policy of nations which have shown themselves intolerant of far less questionable usages.

Early usage.

The earliest custom in the matter agrees with the juster and less artificial view. The rules of the *Consolato del Mare*, which

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enabled a belligerent to seize the property of his enemy wherever he found it, prohibited him at the same time from robbing his friend. While therefore an enemy's ship was subjected to confiscation, its neutral cargo remained free, and it was even provided that the owners of the cargo should be permitted to buy the vessel from the captain at a reasonable price, in order to avoid the inconvenience and loss of being carried into his ports[1]. An early usage to a like effect may probably have existed in the northern seas, for the Hollanders, during war with Lübeck and other Hanse Towns in 1438, ordered that goods belonging to neutrals found in an enemy's ship should not be made prize; and it is said that until the middle of the sixteenth century France observed a like rule[2]. But in 1584 the first of a series of edicts appeared in the latter country which established a national custom of peculiar harshness. It was ordered that 'if the ships of our subjects make a prize in time of war of enemy's ships, in which are persons, merchandise, or other goods of our said subjects or allies, the whole shall be declared good prize as if the whole belonged to our said enemies[3].'

Practices in the seventeenth century.

England, on the other hand, generally maintained the doctrine of the *Consolato del Mare;* but in the beginning of the seventeenth century its views do not appear to have been thoroughly fixed, for in 1626 a French negotiator, the Maréchal de Bassompierre, found the report of commissioners to whom certain points of maritime law had been referred by the English government to be in this point fully in accordance with the usage of his own country[4]. France again perhaps recurred for a time to the general practice by the Royal Declaration of 1650, which granted the freedom of neutral goods in enemy's ships; but she concluded a series of treaties from 1659 downwards, in which her

[1] See a translation of the text of the Consolato in Ortolan, Dip. de la Mer, ii. 68, or Heffter, § 163.

[2] Hübner, 1re partie, chap. i. § 8; Ortolan, ib. 100.

[3] Ortolan, ib. 101. 'Res non hostium non bene capitur ullibi' was the opinion of Albericus Gentilis, De Jure Belli, lib. ii. c. 22.

[4] Ortolan, Dip. de la Mer, ii. 114.

older custom was embodied, and as she formally re-enacted the confiscation of neutral goods by the Ordonnance of 1681, it may be doubted whether the Declaration of 1650 was ever acted upon, and whether therefore it forms a real exception to the settled policy of the country[1].

Whatever the practice of other countries may have been, their external policy was determined by the degree to which they were anxious to acquire or retain carrying trade in war time. It was impossible to obtain the freedom of belligerent goods committed to their care unless a corresponding advantage was offered to belligerents; hence the Dutch, who made it a cardinal object to secure the immunity of their flag, were obliged to buy the privilege by giving up their own merchandise when carried in a belligerent ship; and in all treaties which they concluded the fate of the cargo was determined by that of the vessel[2]. They were no doubt the more ready to make the concession that neutrals seldom require to make use of belligerent vessels to any large extent; and that they consequently gained a valuable privilege at a small price.

In the eighteenth century.

In the eighteenth century the history of the two doctrines continued to follow the line sketched in the previous period. The private custom of England preserved the ancient rule under which neutral goods are free. France, on the other hand, had retained and reiterated in her internal legislation the severities in which she stood alone, until Spain became her imitator under the Bourbon kings. In 1704, 1744, and 1778 the principle

[1] Valin, Ord. de la Marine, ii. 254. M. Ortolan (ii. 104) suggests that the Ordonnance of 1681 was intended only to apply to allies in a common war, and not to neutrals; and its language is not perhaps absolutely inconsistent with his construction, it being only specified that 'les marchandises de nos sujets et alliés qui se trouveront dans un navire ennemi seront de bonne prise.' But as the law was always administered on the assumption that neutrals were affected by its provisions, M. Ortolan's interpretation is no doubt the offspring of a patriotic wish to lessen so far as possible the contrast which exists between the historic doctrines of his country and those which she has adopted in recent times.

[2] Phillimore, iii. § clxxx; Manning, 319. See the Dutch treaties enumerated, antea, p. 686 n.

that goods become enemy under an enemy's flag was freshly asserted; and Spain, by Ordinances in 1702, 1718, and 1779 modelled her laws on the French Regulations in force at the respective dates[1]. Down to the time of the First Armed Neutrality a large number of treaties, for the same reason as in the preceding century, generally stipulated for the condemnation of neutral merchandise in belligerent vessels[2]; but they seem to have had little effect in changing the bent of opinion in the direction of the practice for which they stipulated. Writers so different as Vattel and Hübner could on this point find themselves in accord[3], and England was of one mind with the members of the Armed Neutrality. It was impossible for neutrals to ask more than England already spontaneously gave to them, and accordingly the programme of the Armed Neutralities contained no articles on the subject. But in the nineteenth century the confiscation of neutral goods reappears in the treaties made by France and the United States, set off as usual against the freedom of enemy's goods in neutral vessels; though at the same time the United States have always distinctly acknowledged that under international common law the goods of neutrals in enemy's vessels are free[4].

[1] Ortolan, Dip. de la Mer, ii. 108.

[2] See the treaties mentioned, antea, p. 688, note 2; except the treaty between England and Spain in 1713, which contains no stipulation in the matter. Sir R. Phillimore (iii. § clxxxi), adopting a computation made by Mr. Ward, says that thirty-four treaties from 1713 to 1780 make no mention of the principles, Free ships, free goods; Enemy ships, enemy goods.

[3] 'Les effets des peuples neutres, trouvés sur un vaisseau ennemi, doivent être rendus au propriétaire, sur qui on n'a aucun droit de les confisquer, mais sans indemnité pour retard, dépérissement, &c. La perte que les propriétaires neutres souffrent en cette occasion est un accident auquel ils se sont exposés en chargeant sur un vaisseau ennemi; et celui qui prend ce vaisseau, en usant du droit de la guerre. n'est point responsable des accidents qui peuvent en résulter, non plus que si son canon tue sur un bord ennemi un passager neutre, qui s'y rencontre pour son malheur.' Vattel, liv. iii. chap. vii. § 116.

[4] See the treaties enumerated, antea, p. 691 n. The Atalanta, iii Wheaton, 415. 'It is true that sundry nations have in many instances introduced by their special treaties another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms, friendly goods; but this is altogether the effect of particular treaties, controlling in special cases the

Present state of the question.

Thus while England and the United States were committed, apart from treaties, to the view that the goods of neutrals in course of transport by a belligerent are free, the minor maritime states were led by their interests to adopt the same doctrine; and France stood alone with Spain in the assertion that their confiscation was permitted by accepted usage. When therefore France, in compliance with the request of England, abandoned her national practice in 1854, Spain remained the only country which adhered to it in principle; and the Declaration of Paris has probably secured its abandonment beyond recall[1].

Liability of neutrals to incidental loss from capture.

It is to be noticed that though neutral property in enemy ships possesses immunity from confiscation, the neutral owner is not protected against loss arising incidentally out of the association with belligerent property in which he has chosen to involve his merchandise. Just as a neutral individual in belligerent territory must be prepared for the risks of war and cannot demand compensation for loss or damage of property resulting from military operations carried on in a legitimate manner; so, if he places his property in the custody of a belligerent at sea, he can claim no more than its bare immunity from confiscation, and he is not indemnified for the injury accruing through loss of market and time, when it is taken into the captor's port, or in some cases at any rate for loss through its destruction with the ship.

In 1872 the French Prize Court gave judgment in a case, arising out of the war of 1870–1, in which the neutral owners of property on board two German ships, the Ludwig and the Vorwärts, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though 'under the terms of the Declaration of Paris neutral goods on board an enemy's vessel cannot be seized, it only

general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it.' Mr. Pickering to Mr. Pinckney, American State Papers, i. 559.

[1] [For Spain's practical compliance with the principles of the Declaration of Paris in the war of 1898 see antea, p. 692.]

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follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;' in the particular case 'the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity[1].'

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case for example of a state the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Declaration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity.

[1] Calvo, § 2817.

CHAPTER X

VISIT AND CAPTURE

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Object of visit and capture.

VISIT is the means by which a belligerent ascertains whether a mercantile vessel carrying the flag of a neutral state is in fact neutral, and by which he examines whether she has or has not been guilty of any breach of the law. By capture he gives effect to his rights over neutral property at sea which has become noxious to him in any of the ways indicated in the preceding chapters, and puts himself in a position to inflict the appropriate penalty.

Who can visit.

As the right possessed by the belligerent of controlling intercourse between neutrals and his enemy is an incident of war, and as war can only be waged by or under the authority of a state, the rights of visit and capture must be exercised by vessels provided with a commission from their sovereign.

Who is liable to visit.

All neutral mercantile vessels are subject to visit upon the high seas, and within the territorial waters of the belligerent or his enemy. On the other hand, as the pretension to search vessels of war, which formed a grave matter of contest in the early part of the nineteenth century, can no longer be seriously urged, private vessels of the neutral state are the only subjects of the belligerent privilege. It is incumbent on all such vessels to be provided with certain documents for the proof of their neutral character, and of the innocency of the adventure in which they are engaged, and it is agreed that they are obliged as a general rule to produce these proofs on the summons of a duly authorised person.

Whether convoyed ships can be visited.

But it is a controverted point whether neutral merchant vessels are liable to be visited, and are bound to suffer the visit, when sailing under convoy of ships of war of their own nation. The

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History of the question.

question was first mooted in 1653, when, during the war between England and the United Provinces, Queen Christina of Sweden issued a declaration, reciting that the goods of her subjects were plundered by privateers, directing ships of war to be always ready to convoy such vessels as might desire protection, and ordering the convoying ships 'in all possible ways to decline that they or any of those that belong to them be searched[1].' The Peace of Westminster, in 1654, by putting an end to the existing war, prevented any immediate occasion of dispute from arising, and no subsequent attempt seems to have been made by Sweden to act upon the policy of the directions. The United Provinces however, finding themselves in turn in the position of neutrals, shortly afterwards put forward like claims. In 1654, some Dutch merchant vessels under convoy of a man of war having been searched by the English, the States-General admitted that 'no reasonable complaints could be made,' although they 'were persuaded that such visitation and search tended to an inconveniency of trade;' but two years afterwards De Ruyter convoyed ships from Cadiz to Flanders laden with silver for the use of the Spanish troops in the latter country, and successfully resisted an attempt to visit made by the commodore of an English squadron. In the end the Dutch agreed that the papers of the convoyed ships should be exhibited by the man of war in charge, and that on sufficient ground a suspected vessel might be seized and carried into the belligerent port[2]. The compromise, no doubt, soon became a dead letter[3]; and nothing further was heard of the immunities claimed for convoyed ships until 1759, when the Dutch, who took improper advantage of a special

[1] Thurloe's State Papers, i. 424. [2] Thurloe, ii. 504; Calvo, §§ 2744–5.

[3] The article in the maritime code of Denmark of 1683, quoted by Ortolan (ii. 266) and Gessner (302) as affording another case in which exemption from visit was claimed in favour of convoyed ships, is really a direction to armed merchant vessels sailing together to resist visit whenever they are strong enough. It represents an attempt to get rid of visit altogether. Hautefeuille (tit. ix. chap. iii. sect. i) admits that 'la Hollande elle-même chercha par tous les moyens à exercer le droit de visite sur les navires convoyés toutes les fois qu'elle se trouva partie belligérante.'

privilege of trade with the French colonies which has been granted to them, and who besides carried on a large traffic in munitions of war and materials of naval construction with the home ports of France, fruitlessly endeavoured to cover their illicit transactions by reviving the pretension [1]. It was during the War of American Independence that the doctrine was first seriously urged. In 1780 orders were given by the Dutch government 'that a certain number of men of war should be ready for the future to convoy naval stores to the ports of France,' and the Count van Byland was directed to resist the visit and search of a fleet of vessels so laden, which were sailing in his charge. Some of the vessels were seized by an English force, and were carried into Portsmouth with the convoying ship, which had attacked that of the English commodore. In the lively recriminations which ensued Holland warmly maintained the proposition that convoyed merchantmen could not be searched; and when, a few months afterwards, it found itself at war with England, it was obliged in consistency as a belligerent to adopt the principle of which it had tried to reap the advantage as a neutral [2]. In 1781 a dispute arose between Great Britain and Sweden on the subject of six merchantmen under convoy which an English vessel had attempted to visit; and on an appeal being made by the latter power to Russia, the government of the Empress declared that it considered the principle of the immunity of convoyed vessels to be founded on the principles of the Armed Neutrality. It was also embodied before the end of the century in six treaties made by the Baltic powers, and in one between Holland and the United States [3]. It had therefore acquired such

[1] It appears from a Report of Admiral Boscawen that complaint was made by the Dutch government that he had caused certain merchantmen under convoy to be searched. He says that he acted upon 'certain advice that the Dutch and Swedes carried cannon, powder, and other warlike stores to the enemy.' Ann. Register for 1759, p. 266.

[2] De Martens, Nouvelles Causes Célèbres, i. 165; Lord Stanhope, Hist. of England, vii. 44; De Martens, iii. 281.

[3] United Provinces and United States, 1782 (De Martens, Rec. iii. 437); Russia and Denmark, 1782 (ib. 475); Sweden and the United States, 1783

consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of states possessing very defined and permanent interests. But the doctrine had no claim to the position assigned to it by Count Bernstorff, when, on the occasion of a dispute arising in the year 1800 out of the capture of some Danish vessels by an English squadron, he argued that the privilege of visiting convoyed ships did not exist at common law, because the right to visit at all being a concession made to the belligerent, it could only exist in so far as it was expressly conferred by treaty [1]. There can be no question that the practice of visiting convoyed vessels had been universal until 1781; and that frequent treaties, in specifying the formalities to be observed, without limiting the extent of the right, had incidentally shown that the parties to them regarded the current usage as authoritative.

Throughout the revolutionary wars England maintained the traditionary practice, and imposed her doctrine by treaty upon the Baltic powers. In consequence of the refusal of a Danish frigate, the Freya, to permit the search of her convoy, a second dispute occurred between England and Denmark, which was ended, under threat of an immediate rupture, by a convention under which the latter power engaged to suspend its convoys until future negotiations should have effected a definitive arrangement [2]. Immediately afterwards the Second Armed Neutrality laid down as one of its principles that the declaration of the officer commanding a vessel in charge of merchantmen should be conclusive as to the innocence of the traffic in which they were engaged, and that no search should be permitted [3]. But in the treaties concluded with England in 1801 and 1802, Russia,

(De Martens, Rec. iii. 571); Prussia and the United States, 1785 (id. iv. 43); Russia and France, 1787 (ib. 212); Russia and the Two Sicilies, 1787 (ib. 238); Russia and Portugal, 1787 (ib. 328).

[1] Count Bernstorff to Mr. Merry, ap. Ortolan, ii, Annexe E.

[2] August 29, 1800; De Martens, Rec. vii. 149.

[3] Conventions to this effect were signed between Russia and Denmark in Dec. 1800, and between Russia and Sweden and Russia and Prussia; De Martens, Rec. vii. 172, 181, 188.

Sweden, and Denmark abandoned the principle which they had striven to introduce, and consented that though visit was not to take place unless ground for suspicion existed, the belligerent commander should have the power of making it at his discretion, in presence, if required, of a neutral officer, and of carrying the suspected vessel into one of the ports of his country if he should see reason to do so[1]. In thus agreeing to limit the exercise of the right, the principle of which she preserved, England softened on her part the rigour of her usual practice, gaining, as the price of her concession, the full abandonment of the principle of the freedom of enemy's goods on board neutral ships, which had also been adopted by the Armed Neutrality. But the treaties concluded between England and the three other parties to this compromise in 1812 and 1814 placed matters on their old footing, and left the Baltic powers free to assert, and Great Britain to refuse, the immunity of convoyed vessels[2]. Since then France has accepted the principle of this freedom from visit in six treaties, all with American republics; and the United States have embodied it in thirteen treaties, of which all, with two exceptions, have also been entered into with states on the same continent[3]. But there has already been occasion to remark more than once that the treaties entered into by the United States afford little clue to the views entertained in that country; and on this point, as usually, English and American writers and judges are fully in

Modern practice.

[1] De Martens, vii. 264, 273, 276.

[2] De Martens, Nouv. Rec. i. 481 and 666, and iii. 227. In 1864 Denmark, Prussia, and Austria announced that they would not visit vessels under convoy; Calvo, § 1219.

[3] France and Venezuela, 1843 (De Martens, Nouv. Rec. Gén. v. 171); Ecuador, 1843 (ib. 409); New Grenada, 1844 (id. vii. 620); Chile, 1846 (id. xiv. i. 10); Guatemala, 1848 (id. xii. 10); Honduras, 1856 (id. xvi. ii. 154); United States and Sweden, 1816 (Nouv. Rec. iv. 258); Columbia, 1824 (id. vi. 1000); Central America, 1825 (ib. 835); Brazil, 1828 (id. ix. 63); Mexico, 1831 (id. x. 340); Chile, 1832 (id. xi. 446); Venezuela, 1836 (id. xiii. 560); Ecuador, 1839 (ib. 23); New Grenada, 1848 (Nouv. Rec. Gén. xiii. 663); Guatemala, 1849 (ib. 304); San Salvador, 1850 (id. xv. 77); Peru, 1870 (Nouv. Rec. Gén. 2e Série, i. 103); and Italy, 1871 (Archives de Droit Int. 1874, p. 136).

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accord[1]. On the continent of Europe, Germany, Austria, Spain, and Italy, in addition to the Baltic powers and France, provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain on the other hand adheres to the practice upon which she has always acted[2].

Continental jurists are almost unanimous in maintaining the exemption from visit of convoyed ships, not only as a principle to be advocated, but as an established rule of law[3]. That it has any pretension to be so is evidently inadmissible; the assertion of it, and the practice, which have been described, are insufficient both in kind and degree to impose a duty on dissenting states; and it cannot even be granted that the doctrine possesses a reasonable theoretic basis. The only basis indeed on which it seems to be founded is one which, in declaring that the immunity from visit possessed by a ship of war extends itself to the vessels in her company, begs the whole question at issue[4]. It is more to the purpose to consider whether the privilege claimed by neutrals is fairly consistent with the interests of belligerents, and whether it would be likely in the long run to be to the advantage of neutral states themselves. It is argued that the commander of a vessel of war in charge of a convoy represents his government, that his affirmation pledges the faith of his nation, and that the belligerent has a stronger guarantee in being assured by him that the vessels in company are not engaged in any illicit traffic, than in examining for himself papers which may be fraudulent. But

Whether exemption of convoyed vessels from visit is expedient.

[1] Kent, Comm. lect. vii; Wheaton, Elem. pt. iv. chap. iii. § 29; Dana, notes to Wheaton, § 526; Woolsey, Introduction to International Law, § 192. Justice Story says, 'The law deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance.' The Nereide, ix Cranch, 440. The judgment of Lord Stowell in the case of The Maria, i Rob. 340, is the recognised expression of English doctrine.

[2] Admiralty Manual of Prize Law (Holland), 1888, p. 2.

[3] Bluntschli (§§ 824–5) puts forward a doctrine as law which amounts to the compromise of 1801 between Russia and Great Britain, construed favourably for the neutrals.

[4] Ortolan, ii. 271.

unless the neutral state is to exercise a minuteness of supervision over every ship issuing from her ports which would probably be impossible, and which it is not proposed to exact from her, the affirmation of the officer commanding the convoy can mean no more than that the ostensible papers of the vessels belonging to it do not show on their face any improper destination or object. Assuming that the officials at the ports of the neutral country are always able and willing to prevent any vessel laden with contraband from joining a convoy, the officer in command must still be unable to affirm of the vessels under his charge, that no single one is engaged in carrying enemy's despatches or military passengers of importance; that none have an ultimate intention of breaking a blockade; or, if the belligerent nation acts on the doctrine that enemy's goods in a neutral vessel can be seized, that none of the property in course of transport in fact belongs to the enemy. If the doctrine is accepted, it would not infrequently happen that instances in which protection of a convoy has been abused will come afterwards to the knowledge of the belligerent to whose injury they have occurred; he will believe that the cases of which he knows are but a fraction of those which actually exist, he will regard the conduct of the neutral state with suspicion; complaints and misunderstandings will arise, and the existence of peace itself may be endangered. It cannot be too often repeated that the more a state places itself between the individual and the belligerent, the greater must be the number of international disputes. And belligerents will always look upon convoys with doubt, from the mere fact that their innocence cannot be tested. The neutrality of neutral nations is not always honest, and the temptation to pervert the uses of a convoy has not always been resisted; rightly or wrongly it will be thought, as it was thought in England during the French wars, that 'if there is any truth in the reasons stated for searching merchantmen not convoyed, it must be admitted that the presence of the convoy ship, so far from being a sufficient pledge of their innocence, is rather a circumstance of suspicion. If a neutral

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nation fits out ships of war, and escorts all its trading vessels with them, we have a right to conclude that she is deviating from her neutrality[1].'

It cannot but be concluded that the principle of the exemption of convoyed ships from visit is not embraced in authoritative international law, and that while its adoption into it would probably be injurious to belligerents, it is not likely to be permanently to the advantage of neutrals. It is fortunate, in view of the collision of opinion which exists on the subject, that there is every reason to expect that the use of convoys will be greatly restricted in the future by the practical impossibility of uniting in a common body vessels of very different rates of speed, superior speed having become an important factor in commercial success[2].

Formalities of visit.

The exercise of the right of visit is necessarily attended with formalities, the regulation of which has been attempted in a large number of treaties without any definite arrangement as to the details having received universal assent[3]. Usually the visiting ship, on arriving within reasonable distance, hoists its colours and fires a gun, called the semonce or affirming gun, by

[1] Lord Brougham (1807); Works, vol. viii. 388.

[2] It is to be noted that in the scheme of the Institut de Droit International for a Règlement des Prises Maritimes the visit of neutral vessels convoyed by ships of war of their own state is prohibited. Ann. de l'Institut, 1883, p. 215.

[3] The following article of the Treaty of the Pyrenees (1659) has served as the model for a great number of more modern conventions: 'Les navires d'Espagne, pour éviter tout désordre, n'approcheront pas plus près les français que de la portée du canon, et pourront envoyer leur petite barque ou chaloupe à bord des navires français, et faire entrer dedans deux ou trois hommes seulement, à qui seront montrés les passeports par le maître du navire français, par lesquels il puisse apparoir, non seulement de la charge, mais aussi du lieu de sa demeure et résidence, et du nom tant du maître ou patron que du navire même, afin que, par ces deux moyens, on puisse connaître s'il porte des marchandises de contrebande, et qu'il apparaisse suffisamment tant de la qualité du dit navire que de son maître ou patron; auxquels passeports on devra donner entière foi et créance.' Dumont, vi. ii. 264. Few treaties prescribing formalities of visit have been made between European states during the present century, and in all the cases of such treaties concluded within the last forty years one of the parties has been a Central or South American State.

which the neutral vessel is warned to bring to, but the ceremony, though customary, is not thought to be essential either in English or American practice[1]. The belligerent vessel then also brings to at a distance which, in the absence of treaties, is unfixed by custom, but which has been often settled with needless precision. The natural distrust of armed vessels which was entertained, when privateers of not always irreproachable conduct were employed in every war, and when pirates were not unknown, dictated stipulations enjoining on the cruiser to remain beyond cannon shot; but the reason for so inconvenient a regulation has disappeared, and the modern treaties which repeat the provision, as well as those which permit approach to half range, are alike open to the criticism of M. Ortolan, that 'they have not been drawn by sailors[2].' The visit itself is effected by sending an officer on board the merchantman[3], who in the first instance examines the documents by which the character of the vessel, the nature of her cargo, and the ports from and to which she is sailing, are shown. According to the English practice these documents ought generally to be—

1. The register, specifying the owner, name of ship, size, and other particulars necessary for identification, and to vouch the nationality of the vessel.
2. The passport (sea letter) issued by the neutral state.
3. The muster roll, containing the names, &c., of the crew.

[1] The Marianna Flora, xi Wheaton, 48.

[2] Dip. de la Mer, ii. 256. Negrin (p. 229, note) takes the same view.

[3] Modern usage allows the master of the merchantman to be summoned with his papers on board the cruiser (The Eleanor, ii Wheaton, 262), and the regulations of the German and Danish navies order that this shall be done (Rev. de Droit Int. x. 214, 238); but Pistoye and Duverdy (i. 237) think the practice open to objections both from the point of view of the belligerent and of the neutral. The former may be easily deceived by false papers; and the latter is exposed to the less obvious risk that the documents necessary to prove the legitimacy of his adventure may be detained.

The proposed Règlement des Prises Maritimes of the Institut provides that 'le navire arrêté ne pourra jamais être requis d'envoyer à bord du navire de guerre son patron ou une personne quelconque, pour montrer ses papiers ou pour toute autre cause.' Ann. de l'Institut, 1883, p. 214.

follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;' in the particular case 'the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity [1].'

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case for example of a state the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Declaration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity.

[1] Calvo, § 2817.

CHAPTER X

VISIT AND CAPTURE

Object of visit and capture.

VISIT is the means by which a belligerent ascertains whether a mercantile vessel carrying the flag of a neutral state is in fact neutral, and by which he examines whether she has or has not been guilty of any breach of the law. By capture he gives effect to his rights over neutral property at sea which has become noxious to him in any of the ways indicated in the preceding chapters, and puts himself in a position to inflict the appropriate penalty.

Who can visit.

As the right possessed by the belligerent of controlling intercourse between neutrals and his enemy is an incident of war, and as war can only be waged by or under the authority of a state, the rights of visit and capture must be exercised by vessels provided with a commission from their sovereign.

Who is liable to visit.

All neutral mercantile vessels are subject to visit upon the high seas, and within the territorial waters of the belligerent or his enemy. On the other hand, as the pretension to search vessels of war, which formed a grave matter of contest in the early part of the nineteenth century, can no longer be seriously urged, private vessels of the neutral state are the only subjects of the belligerent privilege. It is incumbent on all such vessels to be provided with certain documents for the proof of their neutral character, and of the innocency of the adventure in which they are engaged, and it is agreed that they are obliged as a general rule to produce these proofs on the summons of a duly authorised person.

Whether convoyed ships can be visited.

But it is a controverted point whether neutral merchant vessels are liable to be visited, and are bound to suffer the visit, when sailing under convoy of ships of war of their own nation. The

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man is not affected by the resistance of the master; for while on the one hand he has a full right to save from capture the belligerent property in his charge, on the other the neutral cannot be assumed to have calculated or intended that visit should be resisted[1]. 'But if the neutral puts his goods on board a ship of force which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, and so far he adheres to the belligerent. . . . If a party acts in association with a hostile force, and relies on that force for protection, he is *pro hâc vice* to be considered as an enemy[2].'

Doctrine of the American courts.

The American courts carry their application of the principle that neutral goods in enemy's vessels are free to a further point, and hold that the right of neutrals to carry on their trade in such vessels is not impaired by the fact that the latter are armed. According to Chief Justice Marshall, 'the object of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right to do so. He meddles not with the armament nor with the war;' and the belligerent suffers no injury from his act, for 'if the property be neutral, what mischief is done by its escaping a search?'

The same doctrine was applied by the government of the

[1] The Catherina Elizabeth, v Rob. 232.

[2] The Fanny, i Dodson, 448. Mr. Justice Story, dissenting from the majority of the Supreme Court, argued strenuously in favour of the view taken by the English courts. 'It is necessarily known to the convoyed ships that the belligerent is bound to resist, and will resist until overcome by superior force. It is impossible therefore to join such convoy without an intention to receive the protection of a belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. To render the convoy an effectual protection it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of an enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent, and performs as to him a meritorious service.' The Nereide, ix Cranch, 441.

Controversy between Denmark and the United States.

United States in a controversy with Denmark which sprung out of the use of English convoys by American vessels trading to the Baltic during war between Denmark and Great Britain. Large numbers of such vessels were in the habit, after receiving cargoes of naval stores in Russia, of assembling on the coasts of Sweden, where they met British men of war, by which they were protected until they were out of danger. As the nature of the cargoes exposed the intention with which this practice was carried on to extreme suspicion, the Danish government issued an ordinance in 1810, declaring all neutral vessels availing themselves of belligerent convoy to be good prize. Several stragglers were captured, without actual resistance being made, and were condemned by the Danish courts, it being considered that an intention to resist had been sufficiently manifested by joining the convoy. It was argued by the American government that though a neutral may not escape from visit by the use of force or fraud, he may use any means of simple avoidance; it was apparently implied that the act of joining a convoy, being open, could not be fraudulent; and it was urged that an actual participation in resistance must be required to involve the neutral in its consequences. A mere intention to resist, not carried into effect, had never, it was said, in the case of a single ship been considered to entail the penalty of confiscation; and the two cases in no way so differed as to call for the application of a different principle. The Danish government on its part seems in effect to have maintained that not only is a settled intention to resist equivalent to actual resistance, but that he who causes himself to be protected 'by an enemy's convoy ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantage attached to the character of a friend to him against whom he seeks protection.'

The United States, after a negotiation extending over twenty years, succeeded in obtaining a treaty, under which Denmark, while expressly declaring that its concession was not to be looked

PART IV CHAP. X upon as a precedent, agreed to pay a sum *en bloc* by way of indemnity to the American subjects whose property had been seized[1].

Capture for fraudulent acts. The occasions on which a neutral vessel may be seized for illicit acts affecting itself, or because its cargo is liable to confiscation, have for the most part been already specified[2]. But there still remains to be noticed, as affecting it with penalties, a class of fraudulent or ambiguous acts of the owner or master, consisting in—

1. The possession of false documents.
2. The destruction or concealment of papers.

False documents. That a vessel is furnished with double or false documents is invariably held to be a sufficient reason for bringing her in for adjudication; and according to Russian practice, at any rate, a false passport, and in Spanish practice double papers of any kind, entail confiscation of both ship and cargo; but generally falsity of papers is regarded with leniency, and is only considered to be noxious when there is reason to believe that the fictitious documents were framed in order to deceive the capturing belligerent, and that they would therefore fraudulently oust the rights of the captors, if admitted as genuine. The ground of this leniency is that, apart from indications that they are directed against the interests of a particular belligerent, they are as likely to have been provided as a safeguard against the enemy of the captor as against the captor himself[3].

[1] Wheaton, Elem. pt. iv. chap. iii. § 32. Mr. Wheaton was the negotiator of the treaty, and is naturally prejudiced in favour of the doctrine which he was employed in pressing; but his annotator, Mr. Lawrence, appears to take a different view. Woolsey (Introd. § 193), Dana (note to Wheaton, § 535), and Kent (Comm. lect. vii) assert the English doctrine as unquestionable. Ortolan (ii. 275) adopts the same opinion, subject only to the reservation that if a neutral vessel meeting a belligerent convoy attaches itself to it, her conduct may be looked upon as an innocent ruse to escape the inconvenience of a visit, and not as implying an intention to resist. The contrary doctrine has no better defender than M. Hautefeuille, tit. xi. chap. iii. sect. 2.

[2] Comp. antea, pp. 667, 673, 693-5, 705, 710.

[3] Halleck, ii. 299; The Eliza and Katy, vi Rob. 192; The St. Nicholas, i Wheaton, 417; Rev. de Droit Int. x. 611; Negrin, 251.

By English practice captors are allowed expenses when they have been

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Spoliation of papers.

The destruction or 'spoliation' of papers, and even, though to a less degree, their concealment, is theoretically an offence of the most serious nature, the presumption being that it is effected for the purpose of fraudulently suppressing evidence which if produced would cause condemnation. The French Regulations of 1704, repeated in 1744 and 1778, declared to be good prize all vessels, with their cargoes, on simple proof of the fact that papers had been destroyed, irrespective of what the papers were; but the severity of the rule has been tempered in practice, it being commonly required that the destroyed papers should be proved to be such as in themselves to entail confiscation[1]. In England and America a milder practice is in use. Spoliation or concealment of papers, 'if all the other circumstances are clear,' only affects the neutral with loss of freight; but it is a cause of grave suspicion, and may shut out the guilty person from any indulgence of the court, as for example, from permission to bring further proof if further proof be necessary. If the circumstances are not clear, if for example spoliation takes place when the capturing vessel is in sight, or at the time of capture, or subsequently to it without the destroyed papers having been seen by the captor, further proof would probably be shut out as of course, the natural inference from the circumstances being that they have been destroyed because their contents were compromising[2].

Duties of a captor.

In the absence of proof that he has rendered himself liable to

misled by false papers into capturing an innocent vessel, the papers being intended to deceive the enemy. The Sarah, iii Rob. 330.

[1] Pistoye et Duverdy, ii. 73, citing the case of La Fortune. But in the case of The Apollos, the rule was pressed with extreme rigour. A prize was wrecked at the entrance of the port of Ostend; at the moment when it grounded the captain snatched the ship's papers from the prize-master, and on getting to shore at once lodged them with the *juge de paix*. They established the neutrality of the ship and cargo, and there was no reason to believe that any of the number had been abstracted, but it being possible that in the confusion some might have been destroyed, the penalty of proved destruction was inflicted. Pistoye et Duverdy, ii. 81.

[2] The Rising Sun, ii Rob. 106; The Hunter, i Dodson, 487; Livingston v. The Maryland Ins. Cy., vii Cranch, 544; The Commercen, i Wheaton, 386; The Pizarro, ii Wheaton, 241; The Johanna Emilie, Spinks, 22.

PART IV CHAP. X penalties, a neutral has the benefit of those presumptions in his favour which are afforded by his professed neutrality. His goods are *primâ facie* free from liability to seizure and confiscation. If then they are seized, it is for the captor, before confiscating them or inflicting a penalty of any kind on the neutral, to show that the acts of the latter have been such as to give him a right to do so. Property therefore in neutral goods or vessels which are seized by a belligerent does not vest upon the completion of a capture. It remains in the neutral until judgment of confiscation has been pronounced by the competent courts after due legal investigation. The courts before which the question is brought whether capture of neutral property has been effected for sufficient cause are instituted by the belligerent and sit in his territory; but the law which they administer is international law.

Such being the position of neutral property previously to adjudication, and such being the conditions under which adjudication takes place, a captor lies under the following duties:

1. He must conduct his visit and capture with as much regard for persons and for the safety of property as the necessities of the case may allow; and though he may detain persons in order to secure their presence as witnesses, he cannot treat them as prisoners of war, nor can he exact any pledges with respect to their conduct in the future as a condition of their release. If he maltreats them the courts will decree damage to the injured parties[1].

2. He must bring in the captured property for adjudication, and must use all reasonable speed in doing so. In cases of improper delay, demurrage is given to the claimant, and costs

[1] The Anna Maria, ii Wheaton, 332; The Vrow Johanna, iv Rob. 351; The San Juan Baptista, v Rob. 23; Lord Lyons to Earl Russell, and Mr. Seward to Mr. Welles, Parl. Papers, 1862, lxii. No. i. 119. By the German naval regulations members of the crew detained as witnesses are kept at the cost of the state until decision of the cause, after which they are handed over to the consul of their state to be sent home. Rev. de Droit Int. x. 239.

and expenses are refused to the captor. It follows as of course from this rule—which itself is a necessary consequence of the fact that property in neutral ships and goods is not transferred by capture—that a neutral vessel must not be destroyed; and the principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell: where a ship is neutral, he said, 'the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value.' It is the English practice to give costs and damages as well; to destroy a neutral ship is a punishable wrong; if it cannot be brought in for adjudication, it can and ought to be released [1]. If a vessel is not in a condition to reach a port where adjudication can take place, but can safely be taken into a neutral port, it is permissible to carry her thither, and to keep her there if the local authorities consent. In such case the witnesses, with the ship's papers and the necessary affidavits, are sent in charge of an officer to the nearest port of the captor where a prize court exists.

3. In the course of bringing in, the captor must exercise due care to preserve the captured vessel and goods from loss or damage; and he is liable to penalties for negligence. For loss by fortune of the sea he is of course not liable [2].

[1] The Zee Star, iv Rob. 71; The Felicity, ii Dodson, 383; The Leucade, Spinks, 221.

[2] Restitution in value or damages are given for loss or injury received by a vessel in consequence of a refusal of nautical assistance by the captor. Der Mohr, iv Rob. 314; Die Fire Damer, v Rob. 357.

The principle that a captor must not wilfully expose property to danger of capture by the other belligerent by bringing it to England, when he may resort to Admiralty courts in the colonies, was admitted in the Nicholas and Jan, i Rob. 97, though in the particular case the court decided against the claimant of restitution in value on the ground that due discretion had not been exceeded.

CHAPTER XI

NEUTRAL PERSONS AND PROPERTY WITHIN BELLIGERENT JURISDICTION

General position of neutral persons and property within belligerent jurisdiction.

As a state possesses jurisdiction, within the limits which have been indicated, over the persons and property of foreigners found upon its land and waters, the persons and property of neutral individuals in a belligerent state are in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects.

So also, as neutral individuals within an enemy state are subject to the jurisdiction of that enemy and are so far intimately associated with him that they cannot be separated from him for many purposes, they and their property are as a general principle exposed to the same extent as non-combatant enemy subjects to the consequences of hostilities. Neutral persons are placed in the same way as subjects of the state under the temporary jurisdiction of the foreign occupant, acts of disobedience are punishable in like manner, and the belligerent is not obliged, taking them as a body, to show more consideration to them in the conduct of his operations than he exhibits towards other inhabitants of the country—he need not, for example, give them an opportunity of withdrawing from a besieged town before bombardment, which he does not accord to the population at large. Their property is not exempt from contributions and requisitions.

To a certain extent however, which is not easily definable, neutral persons taken as individuals are in a more favourable position, relatively to an occupying belligerent, than are the

members of the population with which they are mixed. As subjects of a friendly state, it is to be presumed until the contrary is shown that they are not personally hostile; as such subjects, living in a country under the government of the belligerent, they are entitled to the advantages of his protection and of the justice which he administers to his natural subjects, so far as the circumstances of war will allow. Hence he ought to extend to them such indulgences as may be practicable, and he is not justified in subjecting them to penalties on those light grounds of suspicion, which often suffice for him, perhaps inevitably, in his dealings with enemies.

The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state is clear and indisputable; and no objection can be made to its effect upon property which is associated either permanently or for a considerable time with the belligerent territory. But it might perhaps have been expected, and it might certainly have been hoped, that its application would not have been extended to neutral property passingly within a belligerent state. The right to use, or even when necessary to destroy, such property is however recognised by writers, under the name of the right of angary[1]; its exercise is guarded against in a certain number of treaties[2]; and when not so guarded

Right of angary.

[1] In the end of the eighteenth century De Martens said (Précis, § 269, ed. 1789) that 'it is doubtful whether the common law of nations gives to a belligerent except in cases of extreme necessity, the right of seizing neutral vessels lying in his ports at the outbreak of war, in order to meet the requirements of his fleet, on payment of their services. Usage has introduced the exercise of this right, but a number of treaties have abolished it.' Azuni, on the other hand, treats it as a right existing in all cases of 'necessity of public utility,' and declares any vessel attempting to avoid it to be liable to confiscation. Droit Maritime, ch. iii. art. 5.

Of recent writers Sir R. Phillimore (iii. § xxix), and M. Heffter (§ 150), unwillingly, and M. Bluntschli (§ 795 bis) less reservedly, recognise the right.

[2] Stipulations forbidding the seizure of ships or merchandise in times both of peace and war for public purposes were not uncommon in the end of the eighteenth century, but they do not appear after the early years of the last century.

against, it has occasionally been put in practice in recent times with the acquiescence of neutral states. In a large number of treaties the neutral owner is to some extent protected from loss by a stipulation that he shall be compensated[1]; and it is possible that a right to compensation might be generally held to exist apart from treaties.

The most recent cases of the exercise of the right of angary occurred during the Franco-German War of 1870–1. The German authorities in Alsace, for example, seized for military use between six and seven hundred railway carriages belonging to the Central Swiss Railway, and a considerable quantity of Austrian rolling stock, and appear to have kept the carriages, trucks, &c., so seized for some time. Another instance which occurred nearly at the same moment attracted a good deal of attention, and is of interest as showing distinct acquiescence on the part of the government of the neutral subjects affected. Some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair in order to prevent French gun-boats from running up the river, and from barring the German corps operating on its two banks from communication with each other. The German commanders appear to have endeavoured in the first instance to make an agreement with the captains of the vessels to sink the latter after payment of their value and after taking out their cargoes. The captains having refused to enter into any such agreement, their refusal was by a strange perversion of ideas 'considered to be an infraction of neutrality,' and the vessels were sunk by the unnecessarily violent method of firing upon them while some at least of the members of the crew appear to have been on board. The English government did not dispute the right of the Germans to act in a general sense in the manner which they had adopted, and notwithstanding the objectionable details of their conduct, it confined itself to a demand that the persons whose property had been destroyed should receive the compensation to

[1] These treaties are all made with Central or South American States.

which a despatch of Count Bismarck had already admitted their right. Count Bismarck on his side, in writing upon the matter, claimed that 'the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage;' but he evidently felt that the violence of the methods adopted needed a special justification, for he went on to say, 'the report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification [1].'

[1] D'Angeberg, Nos. 914, 920, 957; State Papers, 1871, lxxxi. c. 250. A considerable portion of the French expedition to Egypt in 1798 seems to have been carried in neutral vessels seized in the ports of France, De Martens, Rec. vii. 163; and compare an order of Napoleon for the seizure for that purpose of some vessels in Marseilles (Corresp. iv. 101).

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